NO. 43752-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOHN and JANET JOHNSON,
and the marital community comprised thereof,

Appellants,

v.

TOBIN and CRYSTAL MILLER,
and the marital community comprised thereof,

Respondents.

BRIEF OF APPELLANTS JOHN AND JANET JOHNSON

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INTRODUCTION

One rainy night, John Johnson visited his stepdaughter and her boyfriend at the home they rented from Tobin and Crystal Miller. The home's rotted porch steps were dangerously slick. The porch's exterior light had stopped working, leaving the stairway in total darkness. The stairway also lacked a landing and handrails. As Johnson began walking down the steps, he lost his footing, fell, and was injured.

The conditions that caused Johnson's fall violated the Residential Landlord-Tenant Act (RLTA), chapter 59.18 RCW, and the implied warranty of habitability that inheres in every residential lease in this State. The Millers had notice of these conditions: they had recently visited the property several times when these conditions were visible.

This appeal asks whether Johnson can be compensated for his injuries. It presents the question that this Court reserved in *Pruitt v. Savage*, 128 Wn. App. 327, 115 P.3d 1000 (2005): When a tenant's social guest is injured because the landlord has negligently violated the RLTA or the implied warranty of habitability, is the landlord liable to the guest?

As a matter of precedent and logic, the landlord should be liable. For nearly a century, Washington courts have held that when landlords owe a duty to a tenant, they owe the same duty to the tenant's guest—and are liable to the guest for breaching that duty just as they would be to the

tenant. Washington courts also hold that a landlord is liable to a tenant who suffers injury because the landlord has negligently breached his duties under the RLTA or the implied warranty of habitability. Here, the Millers violated the RLTA and the implied warranty of habitability, and Johnson was injured as a result. Because the Millers would be liable to a tenant who had been injured in Johnson's circumstances, they are also liable to Johnson.

Common sense and policy considerations also dictate that the landlord should be liable. When guests visit a tenant, they reasonably expect that the landlord will have kept the premises safe. Plus, it is landlords, and not tenants or their guests, who are best placed to eliminate dangerous conditions on rental premises. Eliminating dangerous conditions is also what the law requires landlords to do already, so recognizing liability in these circumstances would impose no new obligations on them. The holding that Johnson seeks is modest and already implicit in Washington law.

ASSIGNMENTS OF ERROR

I. Assignments of error

(1) The trial court erred in granting partial summary judgment in favor of the Millers in its order dated April 12, 2011.

(2) The trial court erred in granting summary judgment in favor of the Millers in its order dated April 25, 2012.

(3) The trial court erred in denying Johnson's motion for reconsideration in its order dated July 5, 2012.

II. Issue pertaining to the assignments of error

(1) A landlord is liable to a tenant who suffers injury because the landlord has violated the implied warranty of habitability or the Residential Landlord Tenant Act. A landlord owes the same duties to a tenant's guest as to the tenant. Plaintiff John Johnson, a guest of Defendants' tenants, was injured because Defendants had violated the implied warranty of habitability and the Residential Landlord Tenant Act. Are Defendants liable to Johnson? (Assignments of error 1, 2, and 3.)

STATEMENT OF THE CASE

I. Factual background

John Johnson visited his stepdaughter's home on a cold and rainy November night. (Clerk's Papers ("CP") 323 at 25:11–13; CP 41, ¶ 4.) His stepdaughter, Athena "Sandy" Caldwell, lived there with her child and her boyfriend, Taurus Baxter, in a manufactured home rented from Tobin and Crystal Miller, the Defendants. (CP 359 at 23:25–24:2; CP 40, ¶¶ 2–3.) Johnson chatted with Caldwell and Baxter about the hunting trip he had just returned from, and after about thirty minutes to an hour he got up to leave. (CP 323 at 25:18–21; CP 360 at 24:11–19.)

Permanently attached to the manufactured home is a stairway that leads down from the home's small enclosed porch. (CP 351 at 14:22–15:8.) As Johnson started to descend these stairs, he slipped and fell with

"a big thud" flat on his back, and was injured. (CP 324 at 26:13; CP 328 at 30:25–31:4; CP 365 at 30:9–11.)

There were a number of problems with the manufactured home's porch and stairs.

First, the steps were "falling apart." (CP 380 at 47:9.) They had visibly rotted, would bend when stepped on, and became exceedingly slippery when it rained. (CP 324 at 27:9–14; CP 372 at 37:13–16; CP 380 at 47:5–7; CP 383 at 50:13–15.) Taurus Baxter and Sandy Caldwell testified that they and their visitors were consistently slipping on the steps. (CP 329 at 32:20–24; CP 330 at 33:5–8; CP 371 at 37:9–12.) This had been happening since Baxter and Caldwell had begun living at the manufactured home. (CP 331 at 34:4–5.) "Every time it rains," said Baxter, "someone slips." (CP 330 at 33:8.) The steps were so rotted that, after Johnson's fall, a visitor actually stepped through one of them. (CP 381 at 47:17–48:4.)

Second, the manufactured home had a motion-sensor light outside of the enclosed porch to illuminate the stairway—but the light was not working on the night of Johnson's fall. (CP 52, ¶ 4; CP 326–27 at 29:19–21; CP 382 at 48:15–20.) There was conflicting testimony on why the light was not working. While Baxter said that he would usually turn the sensor off once the winter rains began, Caldwell testified that the sensor

was always turned on and the light simply malfunctioned. (CP 315 at 16:15–18; CP 352 at 15:18–16:12; *see also* CP 314 at 15:13–15). It had been months, Caldwell said, since the light had worked. (CP 362 at 27:4–6.) A light inside the enclosed porch was kept on, but anytime the porch's outside door was closed or blocked, the area outside the porch, including the stairway, was left in darkness. (CP 46, ¶ 4; CP 327 at 29:23–30:8; CP 382–83 at 48:21–49:23.)

Third, contrary to code, the stairs to the porch had no landing outside the porch door, a condition that Johnson's expert witness testified was dangerous. (CP 121.)

Finally, the stairway to the porch had no handrail. The wooden handrails on both sides of the stairs had rotted, and Baxter had removed them. (CP 315 at 17:7–11.) On the night that Johnson was injured, Baxter had not yet gotten around to replacing the missing handrails—his work kept him away from home for weeks at a time, and when he returned home he just wanted to spend the time with his family. (CP 316–17 at 18:18–19:3; CP 332 at 36:8–22; CP 334 at 37:13–15.) While Baxter did not remember precisely how long the handrails had been missing before Johnson's injury, Caldwell said that the handrails had been missing for up to three months before the injury. (CP 51 ¶ 2; CP 317 at 19:15–18; CP 333 at 36:23–37:11.)

Baxter had taken it upon himself to remove the handrails because he and the Millers had agreed that Baxter was to make repairs to the manufactured home. (CP 42, ¶ 13; CP 291:5–6.) The Millers knew, however, that Baxter's work took him away from the residence—and took away his ability to make repairs—for weeks at a time. (CP 333 at 36:19–22.)

The Millers also visited the property at regular intervals. Caldwell said that in the time preceding Johnson's fall, the Millers had come to the property about once a month. (CP 356 at 20:16–20; CP 357 at 21:11–13.) She was sure that the Millers had visited the property at least once while the steps were visibly rotting and the motion-sensor light was erratic. (CP 358 at 22:13–23:2; CP 383 at 50:9–19.) But the Millers never made any inspection of the manufactured home. (CP 288:6–9; CP 383 at 50:2–12.)

II. Procedural history

Johnson[1] filed suit against the Millers, alleging that their negligence caused his injuries. (CP 12.) Johnson sought compensation for, among other things, medical expenses, mental and emotional distress, and loss of consortium. (CP 12–13.)

[1] The Plaintiffs in this case are John Johnson, John's wife Janet Johnson, and their marital community, but for the sake of simplicity this Brief will refer to the Plaintiffs in the singular as "Johnson."

The Millers sought summary judgment on various grounds. Johnson, relying on the expert testimony of a safety consultant and other evidence, opposed. Johnson argued that the Millers' violations of the RLTA[2] and the implied warranty of habitability made them liable. (CP 90–91.) The Superior Court denied the Millers' summary judgment motion. (CP 211–13.)

The Millers moved for reconsideration. They maintained that they were not bound by an implied warranty of habitability, and that they could not be held liable under the RLTA, which, they said, did not create a cause of action for third parties. (CP 218–20.) Johnson responded that he was asserting valid common-law causes of action. The Millers were liable, Johnson maintained, because his injuries resulted from their violations of the implied warranty of habitability and the duties that the RLTA imposed on them. (CP 230–31.) The Superior Court granted the Millers' motion for reconsideration and entered partial summary judgment in favor of the Millers. (CP 236–37.) In this decision, the Court ruled that there was a

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[2] The Millers have not contested that the RLTA governed the rental of the manufactured home. The RLTA governs the rental of manufactured homes themselves, as in this case, as opposed to the mere rental of a mobile home lot. *See* RCW 59.20.040 ("Rentals of mobile homes, manufactured homes, or park models themselves are governed by the Residential Landlord-Tenant Act, chapter 59.18 RCW.").

triable issue as to whether the Millers were vicariously liable for Taurus Baxter's acts. (CP 237.)

After further discovery, the Millers again moved for summary judgment, this time on the ground that the Millers could not be vicariously liable. (CP 239.) Johnson responded that the Millers, notwithstanding any agency or independent-contractor relationship with Baxter, owed duties to him under the RLTA and the common law, and that the condition of the manufactured home violated those duties. (CP 271–80.) Johnson also argued that the Millers were independently negligent for failing to protect Johnson from Taurus Baxter's negligence. (CP 279–280.) The Superior Court sided with the Millers, and entered an order concluding that the Millers were liable to Johnson neither under the common law nor under the RLTA. (CP 412.)

Johnson then moved for reconsideration. (CP 414–20.) The Superior Court denied the motion, holding that (1) the Millers' common-law duty was limited to repairing certain latent defects that existed at the beginning of the lease; (2) the implied warranty of habitability did not protect nontenants; and (3) the RLTA did not impose a duty to repair defects if the tenant had not notified the landlord of those defects. (Verbatim Report of Proceedings ("VRP") 153:5–154:12.)

Final judgment was entered on July 5, 2012. (CP 437–438.) A notice of appeal and an amended notice of appeal were timely filed on July 27, 2012, and August 2, 2012, respectively. (CP 440, 445–46.)

SUMMARY OF ARGUMENT

When Washington courts are asked to recognize a tort duty and allow an injured person to be compensated, they examine "considerations of logic, common sense, justice, policy, and precedent." *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001) (quotation marks and citation omitted). Here, logic and precedent, as well as common sense, justice, and policy, mandate that Johnson be allowed to recover from the Millers for his injuries.

1. Logic and precedent. While this appeal presents a question of first impression, the answer to that question is predetermined by already-existing principles of Washington law. As a simple matter of logic, these principles establish that the Millers are liable to Johnson.

Washington courts have long held that landlords owe the same duties to a tenant's guest as they owe to the tenant, and that, if they violate those duties, they are liable to the tenant's guest just as they would be to the tenant. Washington courts have also held that when a tenant is injured because the landlord has violated the implied warranty of habitability or the RLTA, the tenant may recover damages for the injury. Because the

conditions at the Millers' manufactured home violated the RLTA and the implied warranty of habitability, a tenant in Johnson's circumstances could recover for her injuries. And because a tenant in Johnson's circumstances could recover, Johnson can also recover for his injuries.

2. Common sense, justice, and policy. Considerations of common sense, justice, and policy also favor recognizing that the Millers owed a duty to Johnson.

Not to recognize a duty of care is to ignore reality. Tenants regularly invite friends and family to visit them, and their guests reasonably expect that the property owner will keep the property safe.

It is not the tenant—and it is certainly not an injured guest like Johnson—who should bear the risk of injury here. The law makes the landlord, and not the tenant, responsible for correcting violations of the RLTA and the implied warranty of habitability. It is also far cheaper and easier for landlords than it is for tenants or guests to correct those violations.

If this Court agrees with Johnson, landlords would not be opened up to limitless liability. In seeking relief, Johnson does not ask that landlords do anything more than what the law already requires them to do: eliminate hazards that violate the RLTA and implied warranty of

habitability. And landlords may avoid liability altogether simply by exercising reasonable care.

ARGUMENT

I. Standards of review

The Superior Court granted the Millers' motions for summary judgment. An order granting summary judgment is reviewed de novo. *Riley v. Andres*, 107 Wn. App. 391, 395, 27 P.3d 618 (2001). On summary judgment, all facts are construed, and all reasonable inferences are drawn, in favor of the nonmoving party. *Id.* Summary judgment is appropriate only when no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c).

The Superior Court also denied Johnson's motion for reconsideration. It denied the motion on purely legal grounds, holding that—as a matter of law—the Millers did not owe a duty to Johnson. (VRP 153–54.) An order denying a motion for reconsideration is reviewed for abuse of discretion. *McCallum v. Allstate Prop. & Cas. Ins. Co.*, 149 Wn. App. 412, 419–20, 204 P.3d 944 (2009). A trial court abuses its discretion if, among other things, it applies an incorrect legal rule. *See, e.g.*, *Fishburn v. Pierce County Planning & Land Servs. Dep't*, 161 Wn. App. 452, 472, 250 P.3d 146 (2011); *McCallum*, 149 Wn. App. at 420.

The central question in this appeal is whether the Millers owed Johnson a duty of care. That is a question of law reviewed de novo. *Linville v. State*, 137 Wn. App. 201, 208, 151 P.3d 1073 (2007).

II. The Millers are liable to Johnson for the injuries he suffered because of the Millers' violations of the Residential Landlord-Tenant Act and the implied warranty of habitability.

This appeal can be decided on the basis of three simple propositions.

First, Washington courts, going back at least a century, hold that landlords owe the same duties to tenants as to their guests, and that, when landlords breach those duties, they are liable to the tenant's guest just as they would be to the tenant.

Second, when a tenant is injured because the landlord has violated the implied warranty of habitability or the RLTA, the landlord is liable for the tenant's injury. Washington courts to reach and decide this issue are unanimous.

Third, the Millers violated the RLTA and the implied warranty of habitability in a number of independent ways. They allowed the steps leading to the manufactured home's porch to rot. They failed to provide a functioning light to illuminate the steps. They also failed to provide a landing, which is required by code. And they allowed their independent

contractor, Taurus Baxter, to remove but fail to replace the handrails on the stairway leading to the porch.

The inescapable conclusion is that, because the Millers would be liable to a tenant who got hurt because of their violations, they are also liable to Johnson, their tenants' guest. This case is as simple as that. What is more, the conclusion required by logic is the same conclusion favored by the Second Restatement of Property and by numerous other jurisdictions.

Compelling considerations of policy also require that the Millers compensate Johnson for the injuries their negligence caused him. Guests like Johnson reasonably expect to emerge from their social visits in one piece; it is the landlord who is best able to prevent injuries like Johnson's; and allowing Johnson to recover will not expand landlords' obligations and will lead to narrowly delimited liability.

A. Under longstanding Washington law, landlords are liable to a tenant's guest if they would be liable to the tenant.

This State has long accepted the "general principle" that the tenant's guest is "so identified with the tenant that his right of recovery for injury as against the landlord is the same as that of the tenant would be had he suffered the injury." *Mesher v. Osborne*, 75 Wash. 439, 446, 134 P. 1092 (1913). This century-old rule has been repeatedly reaffirmed, both

explicitly, *see, e.g.*, *McGinnis v. Keylon*, 135 Wash. 588, 591, 238 P. 631 (1925), and implicitly. This Court, for example, has observed that the law of premises liability puts tenants and their guests in the same category, that of invitee. *Sjogren v. Props. of Pac. Nw., LLC*, 118 Wn. App. 144, 148, 75 P.3d 592 (2003). Even more instructive is *Rossiter v. Moore*, 59 Wn.2d 722, 370 P.2d 250 (1962), where a tenant's social guest fell from a back porch after the landlord had removed the railing. The *Rossiter* court, in a pre-RLTA decision, held that there was an unresolved issue of fact as to whether the landlord had agreed in the rental agreement to make repairs. *See id.* at 723–24, 727 ("The trier of the fact may conclude that the removal of the railing of the respondent implied an obligation to replace it . . . ."). In concluding that the guest could recover for injuries, *Rossiter* necessarily concluded that, for purposes of a duty to make repairs, the tenant's guest stood in the shoes of the tenant.

This legal principle was well known to the Legislature that enacted the RLTA. *See, e.g.*, *In re Detention of Hawkins*, 169 Wn.2d 796, 802, 238 P.3d 1175 (2010) (in construing statutes, courts "presume that the legislature is aware of long-standing legal principles"). It was, of course, also well known to our Supreme Court when, in 1973, it held that the implied warranty of habitability inheres in "all contracts for the renting of premises, oral or written." *Foisy v. Wyman*, 83 Wn.2d 22, 28, 515 P.2d

160 (1973). Under the RLTA and the implied warranty of habitability, therefore, the same venerable principle holds true: a tenant's guest is owed the same duties as the tenant, and for purposes of tort recovery stands in the tenant's shoes.

B. The Millers would be liable to a tenant who suffered injuries because the Millers had violated the RLTA and the implied warranty of habitability.

Washington courts to address the issue agree: a landlord is liable to a tenant who suffers personal injury as a result of the landlord's violation of the RLTA or the implied warranty of habitability.

1. When a tenant is injured because of a violation of the RLTA, the landlord is liable.

The RLTA imposes enumerated duties on residential landlords such as the Millers. The landlord must, for example, ensure that the rental premises "substantially comply" with codes or ordinances that could be enforced against the landlord if noncompliance with the code or ordinance "substantially endangers or impairs" the tenant's health or safety. RCW 59.18.060(1). The landlord must also maintain all "structural components" of the dwelling so that they are "in reasonably good repair so

as to be usable and capable of resisting any and all normal forces and loads to which they may be subjected." RCW 59.18.060(2).[3]

These duties go beyond the traditional common-law duties that a landlord owed a tenant. *See, e.g.*, *State v. Schwab*, 103 Wn.2d 542, 554, 693 P.2d 108 (1985) (noting that the RLTA "modified the common law so as to require decent, safe and sanitary housing" and "added a covenant to repair to most residential rental agreements"). Under the RLTA, traditional common-law inquiries—whether a defect is latent or obvious, for example, or whether it existed at the beginning of the lease or arose after it, *see, e.g.*, *Frobig v. Gordon*, 124 Wn.2d 732, 735–36, 881 P.2d 226 (1994)—do not enter into the picture. Instead, the plain language of the RLTA must be followed. The duties imposed under that language do not depend on whether the defect is latent, or whether the defect existed at the beginning the lease. *See* RCW 59.18.060 (imposing duties that apply "at all times during the tenancy"); RCW 59.18.060(5) (imposing duty to repair if defect arises after "the commencement of the tenancy").

A landlord who violates these duties is liable to a tenant who suffers personal injury because of the violation. On this issue, courts in

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[3] The RLTA was amended in 2011. Laws of 2011, ch. 132, § 2. The version of the RLTA quoted throughout this brief is the version that was effective when Johnson was injured.

Washington are unanimous. *Tucker v. Hayford*, 118 Wn. App. 246, 257–58, 75 P.3d 980 (2003); *Lian v. Stalick*, 106 Wn. App. 811, 822, 25 P.3d 467 (2001); *Pinckney v. Smith*, 484 F. Supp. 2d 1177, 1181–82 (W.D. Wash. 2007).

These decisions—*Tucker*, *Lian*, and *Pinckney*—adopted Restatement (Second) of Property section 17.6 (1977), 17.6 which provides that a landlord is liable to tenants and their guests for physical injury caused by a dangerous condition on the premises. Section 17.6 provides that if the landlord has failed to exercise reasonable care to repair this dangerous condition, and the condition violates either "(1) an implied warranty of habitability," or "(2) a duty created by statute or administrative regulation," then the landlord is liable. *Id.* The RLTA both codifies a limited warranty of habitability and is a statute that creates duties, so a violation of the RLTA comes within the rule adopted by *Tucker*, *Lian*, and *Pinckney*.

Quite apart from those precedents, Restatement (Second) of Torts section 286 (1965) independently mandates that tenants may recover against a landlord whose negligent violation of the RLTA causes personal injuries. Section 286, already adopted in this State, is used to determine when a statute creates a duty of care under tort law. *See Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 474–75, 951 P.2d 749 (1998).

Section 286 provides that a statute creates a duty of care if the "purpose" of the statute "is found to be exclusively or in part"

> (a) to protect a class of persons which includes the one whose interest is invaded, and
>
> (b) to protect the particular interest which is invaded, and
>
> (c) to protect that interest against the kind of harm which has resulted, and
>
> (d) to protect that interest against the particular hazard from which the harm results.

Restatement (Second) of Torts § 286. As the very name of the statute announces, tenants are among "the class of persons" that the RLTA intends to protect, thus satisfying the first prong of section 286's four-part test. *Id.* § 286(a). The other three prongs of section 286 are also met. Protecting bodily safety (the "particular interest which [was] invaded") is one of the RLTA's evident purposes. *Id.* § 286(b). Likewise, the RLTA is meant to protect *against* bodily harm ("the kind of harm which has resulted") caused by hazardous conditions in the rental premises ("the particular hazard from which the harm results"). *Id.* § 286(c)–(d). These purposes are clear from the RLTA's prohibition against code violations that substantially endanger or impair a tenant's health or safety, as well as its prohibition against structural components that are unusable or cannot withstand normal forces or loads. RCW 59.18.060(1)–(2). Under

Restatement section 286, the RLTA creates a duty of care running from landlord to tenant.

Despite the holdings of other Washington courts and the straightforward application of Restatement section 286, the Millers have argued that the RLTA does not create a private right of action. This argument both misses the point and is wrong on its own terms.

The Millers' argument misses the point because the cause of action that other Washington courts have recognized is a *common-law* cause of action—a cause of action expressly preserved by the RLTA. *See* RCW 59.18.090(2) (preserving all remedies "otherwise provided by law"). Relying on Restatement (Second) of Property section 17.6, the *Lian* and *Pinckney* courts held that the common law supported a cause of action "for injuries caused by the landlord's breach of the RLTA." *Lian*, 106 Wn. App. at 822; *accord Pinckney*, 484 F. Supp. 2d at 1180 (citing Restatement (Second) of Property § 17.6). Just like any other tort based on the violation of a regulation or statute, this cause of action is not an implied private right of action just because it is based on a violation of the RLTA.

The Millers' argument that the RLTA does not create a private right of action is also wrong on its own terms. *Tucker* held that the RLTA creates an implied damages remedy. *Tucker*, 118 Wn. App. at 257.

As *Tucker* recognized, the drafters of the RLTA were careful not to make the statute's express remedies exclusive. *See id.* (quoting RCW 59.18.090).

2. *When a tenant is injured because of a violation of the implied warranty of habitability, the landlord is liable.*

In addition to the duties enumerated in the RLTA, our Supreme Court has imposed an implied warranty of habitability on "all contracts for the renting of premises, oral or written." *Foisy v. Wyman*, 83 Wn.2d 22, 28, 515 P.2d 160 (1973). This warranty supplants the old common-law rules governing leaseholds. *See id.*

The implied warranty of habitability supplies broader protections to tenants than does the RLTA. While the duties imposed by the RLTA are limited to those enumerated in the statute, *Aspon v. Loomis*, 62 Wn. App. 818, 825–26, 816 P.2d 751 (1991), the implied warranty of habitability forbids *any* condition that "creates an actual or potential safety hazard to the occupants." *Landis & Landis Constr., LLC v. Nation*, --- Wn. App. ---, 286 P.3d 979, 983 (2012); *accord Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 519–22, 799 P.2d 250 (1990); *Lian*, 106 Wn. App. at 818.

The implied warranty of habitability is independent of the duties and remedies of the RLTA. Indeed, it *must* be independent, since *Foisy*,

the case that recognized the implied warranty, postdated the RLTA. *See id.* at 33 (noting the passage of the RLTA). If the implied warranty of habitability were coextensive with the RLTA, *Foisy* would not have had to create the implied warranty. Not surprisingly, courts to consider the question agree that the implied warranty of habitability exists independently of the RLTA. *Landis*, 286 P.3d at 982; *see also Aspon*, 62 Wn. App. at 825 ("[T]he Residential Landlord-Tenant Act and the *Foisy* decision appear to have developed independently. Thus, we cannot presume that the Legislature intended the Act to restrict application of the implied warranty of habitability.").

As with violations of the RLTA, tenants can recover in tort if they are injured because of a violation of the implied warranty of habitability. *Tucker* analyzed the implied warranty of habitability separately from the RLTA and noted that a violation of that implied warranty gave rise to a cause of action for personal injury. *See Tucker*, 118 Wn. App. at 256 (quoting Restatement (Second) of Property § 17.6); *see also id.* at 256–57 (analyzing the violation of the RLTA separately).

3. The Millers did not contract away their duties under the RLTA and the implied warranty of habitability.

The Millers and their tenant Taurus Baxter agreed that Baxter would carry out repairs. (CP 42, ¶ 13; CP 291:5–6.) That agreement,

however, did nothing to eliminate the Millers' duties under the RLTA and the implied warranty of habitability.

The agreement that Baxter would carry out repairs does not mean that the Millers attempted to contract away their duties under the RLTA. Indeed, the Millers could not have *intended* to exempt themselves from those duties, since they did not comply with the preconditions for doing so. *See* RCW 59.18.360(4) (before landlords may exempt themselves from their duties, "[e]ither the local county prosecutor's office or the consumer protection division of the attorney general's office or the attorney for the tenant" must "approve[] in writing the application for exemption").

Nor did the Millers disclaim their duty to comply with the implied warranty of habitability. Such disclaimers "are not favored in the law," and must be "conspicuous" and "specifically bargained for." *Burbo v. Harley C. Douglass*, 125 Wn. App. 684, 693, 106 P.3d 258 (2005). While there is evidence that Baxter agreed to perform repairs and maintenance,[4]

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[4] There is conflicting evidence about the precise scope of the agreement between Baxter and the Millers. The Millers flatly stated in discovery that Baxter was supposed to perform maintenance and repairs. (CP 101:5–6, 110:16–17.) On the other hand, the written rental agreement provides that Baxter may make no additions or improvements to the manufactured home, and Tobin Miller had personally made repairs to the manufactured home on a number of occasions. (CP 36, § 7; CP 52, ¶ 3; CP 97:10.) This conflict in the record makes the existence and scope of Baxter's independent contract an issue of fact for trial. *Cf. Rossiter v. Moore*, 59 Wn.2d 722, 724, 370 P.2d 250 (1962).

nowhere did the Millers expressly disclaim their duty to ensure that those repairs and maintenance would keep the premises in compliance with the implied warranty of habitability.

More fundamentally, the RLTA confirms that "the public policy of this state" stands for "ensuring safe, and sanitary housing," and that no agreement between landlord and tenant may contract away the duty to provide such housing. RCW 59.18.360(3). Likewise, the Second Restatements of Torts and Property both confirm that when a landlord is under a duty to a tenant to maintain or repair the premises, the landlord is liable for the failure of an independent contractor to take reasonable care. *See* Restatement (Second) of Property § 19.1 (recognizing liability "for physical harm caused by the contractor's failure to exercise reasonable care to make the leased property reasonably safe"); Restatement (Second) of Torts § 419 (same); *id.* § 424 & cmt. b ("One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability" if an independent contractor fails to exercise reasonable care "to provide such safeguards or precautions."). If Baxter, the Millers' contractor, failed to exercise reasonable care to ensure compliance with the RLTA or the warranty of habitability, the Millers are liable for injuries caused by that negligence.

C. The Millers failed to exercise reasonable care to correct dangerous violations of the RLTA and the implied warranty of habitability.

Restatement (Second) of Property section 17.6, followed by *Lian*, *Tucker*, and *Pinckney*, makes a landlord liable for injuries caused by "a dangerous condition existing before or arising after the tenant has taken possession," if the landlord "has failed to exercise reasonable care to repair the condition" and the condition violates "(1) an implied warranty or habitability" or "(2) a duty created by statute or administrative regulation." Restatement (Second) of Property § 17.6.

The dangerous conditions that caused Johnson's injury violated the RLTA and the implied warranty of habitability. The Millers failed to exercise reasonable care to repair those conditions. The Millers are therefore liable.

1. The Millers violated the RLTA.

The RLTA enumerates certain requirements for rental premises. There are two requirements that were violated here.

First, all of the rental's "structural components" must be maintained "in reasonably good repair so as to be usable and capable of resisting any and all normal forces and loads to which they may be subjected." RCW 59.18.060(2). Here, the rotted steps leading to the porch of the Millers' manufactured home violated this provision.

The steps of a stairway are a "structural component of [a] dwelling." *Lian*, 106 Wn. App. at 818. Steps that have so rotted that they become dangerously slippery whenever they are wet (*e.g.*, CP 330 at 33:5–8; CP 372 at 37:13–16) would not be "in reasonably good repair so as to be usable" in *any* area of the country. RCW 59.18.060(2). They are especially unusable here in western Washington, which suffers through wet weather much of the year. The Millers' rotted, slippery steps violated the RLTA. *See Lian*, 106 Wn. App. at 818.

Second, the RLTA mandates that rental premises must "substantially comply with any applicable code, statute, ordinance, or regulation . . . , which the legislative body enacting the applicable code, statute, ordinance or regulation could enforce as to the premises rented if such condition substantially endangers or impairs the health or safety of the tenant." RCW 59.18.060(1). The Millers' manufactured home violated this provision because its exterior lacked light and a landing.

The Millers' manufactured home was located in North Bonneville and governed by the North Bonneville Municipal Code. (CP 10, 18.) The version of the Code effective at the time of Johnson's accident provided that additions to a manufactured home, such as the porch and the stairs leading up to it, "shall be governed by the construction codes and applicable sections of the International Building Codes." North Bonneville

Municipal Code § 15.04.080(I) (CP 145). The Code also provided that "[a]ll manufactured homes" were required to comply with the International Building Code, and that any manufactured home that did not "meet decent, safe and sanitary requirements" would not be granted a permit. *Id.* § 15.04.010 (CP 144).

All applicable versions of the International Building Code,[5] in turn, required that every exit be illuminated with at least one foot-candle of light,[6] and that there be a landing on each side of a door. Unif. Bldg. Code §§ 3304(h), 3313(a) (1985) (CP 152, 155); Unif. Bldg. Code §§ 3304(i), 3313(a) (1988) (CP 157, 159); Unif. Bldg. Code §§ 3304(i), 3313(a) (1991) (CP 161, 163); Unif. Bldg. Code §§ 1004.9, 1012.1 (1994) (CP 165, 168). Because the manufactured home here had no working exterior light and no landing, these code provisions were violated.

There is a genuine issue of fact, moreover, as to whether these violations "substantially endanger[ed] or impair[ed] the health or safety" of tenants and guests. RCW 59.18.060(1). Walking down steps in total

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[5] The International Building Code was formerly known as the "Uniform Building Code." (CP 120.)

[6] The "foot-candle" is a widely used measure of light intensity. *Webster's New World Dictionary* 543 (2d coll. ed. 1984); *see also, e.g., State v. Hutch*, 30 Wn. App. 28, 30 n.1, 631 P.2d 1014 (1981); WAC 296-800-21005 (establishing minimum levels of lighting under WISHA, as measured in foot-candles).

darkness is a dangerous proposition—and falling from those steps is hardly a minor danger. There is a potential for serious injury and even death. A dark exterior stairway, then, presents a "*substantial*[]" danger to health and safety. *Id.* (emphasis added). Likewise, the presence of a landing—an enlarged area—in front of a door is meant to provide more stability for a person who is opening or closing the door, so that the shifting of weight involved in opening or closing the door does not throw the person off the stairway. The importance of an enlarged area in front of a door is well illustrated here: it was while he was closing the door that Johnson lost his balance and began to slip. (CP 119.) The lack of a landing, as Johnson's expert testified, is hazardous to life and limb. (CP 121.) Thus, there is also a triable issue as to whether the landing presented a substantial danger to health and safety.

2. *The Millers violated the implied warranty of habitability.*

The implied warranty of habitability is violated by any condition that "create[s] an actual or potential safety hazard" for a tenant. *Landis*, 286 P.3d at 983; *Lian*, 106 Wn. App. at 818.

Here, the rotted stairs, lack of light, and lack of a landing independently (and together) created actual—and substantial—safety hazards. The rotted steps caused constant slips. (CP 329 at 32:20–24;

CP 330 at 33:5–8; CP 371 at 37:9–12.) The lack of light prevented people descending the steps from seeing where they were going. (CP 46, ¶ 4; CP 327 at 29:23–30:8; CP 382–83 at 48:21–49:23.) And the landing, according to expert testimony, also presented an actual safety hazard. (CP 121.)

Accompanying these hazards were the missing handrails, which had been removed by Taurus Baxter. (CP 315 at 17:7–11.) These missing handrails presented an actual and independent safety hazard. (CP 121.) While it was Baxter and not the Millers who removed the handrails, Baxter removed them because, under the rental contract, he was understood to have agreed to perform maintenance and do repairs. (CP 42, ¶ 13; CP 291:5–6.) Though he was an independent contractor, the Millers are still responsible for his failure to exercise reasonable care to replace the handrails. *See* Restatement (Second) of Property § 19.1; Restatement (Second) of Torts § 419; *see also supra* p. 21–23.

3. The Millers failed to exercise reasonable care to correct the violations of the RLTA and the implied warranty of habitability.

There is clear evidence that the Millers failed to exercise reasonable care to correct the rotted steps, the nonfunctioning exterior light, and the lack of a landing. In the months preceding Johnson's fall, the Millers visited the property once a month. (CP 356 at 20:11–20; CP 357 at

21:11–13.) They visited while the steps were visibly rotting and the motion-sensor light was erratic. (CP 358 at 22:13–23:2; CP 383 at 50:9–19.) There is no evidence that a landing was *removed* in the months before Johnson's fall, so the manufactured home necessarily lacked a landing at the time of the Millers' visits.

Since these defects were all visible, the Millers' visits to the property put them on actual notice of them.[7] Despite this, the Millers did not correct the defects. In failing to do so, they fell short of reasonable care.

A reasonable jury could also conclude that the Millers were on actual notice of the missing handrails. The handrails had been missing for up to three months before Johnson's fall, and the Millers were visiting the property once a month. (CP 51, ¶ 2; CP 356 at 20:11–20.) It follows, therefore, that the Millers had visited the property at least once while the handrails were missing.

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[7] Nevertheless, actual notice of defects is not required. In *Tucker*, the landlord lacked actual notice of the dangerous condition, *see Tucker*, 118 Wn. App. at 251–52, but the court held that the tenants could recover for their injuries, *id.* at 256. In *Pinckney*, the court expressly rejected the notion that actual notice was required, reasoning that a failure to formally inspect the premises, such as the Millers' failure here, was an argument in *favor* of liability, not an argument against it. *See Pinckney*, 484 F. Supp. 2d at 1181.

Even if the Millers had not been on actual notice of the missing handrails, however, that would not make a difference. In removing but failing to replace the handrails, Taurus Baxter failed to act with reasonable care; he said so himself. (CP 334 at 37:17 (stating "I get lazy").) The Millers are liable for the negligence of Baxter, their independent contractor. Restatement (Second) of Property § 19.1; Restatement (Second) of Torts § 419.

D. Because the Millers owed the same duties to Johnson as they did to their tenants, the Millers are liable to Johnson for the injuries he suffered.

1. Under established Washington law, the Millers are liable to Johnson.

In Washington, landlords owe the same duties to both tenants and their guests, and they are liable to a tenant's guest for breaching those duties in the same way they would be liable to the tenant. *See supra* Part II.A. So, because the Millers would be liable to a tenant who was injured in the same way as Johnson, *see supra* Part II.B–C, they are also liable to Johnson. It is also the result independently dictated by the Second Restatement of Property. And it is, finally, the result endorsed by numerous other jurisdictions.

2. *Under Restatement (Second) of Property section 17.6, the Millers are liable to Johnson.*

The Second Restatement of Property also calls for liability here. *Lian*, *Tucker*, and *Pinckney* adopted and applied Restatement (Second) of Property section 17.6, which—as noted above—provides for liability to a tenant for breach of the RLTA or the implied warranty of habitability. *See Tucker*, 118 Wn. App. at 256; *Lian*, 106 Wn. App. at 822; *Pinckney*, 484 F. Supp. 2d at 1180. Section 17.6 also provides for liability, in the same circumstances, to a tenant's guest—that is, to "others upon the leased property with the consent of the tenant." Restatement (Second) of Property § 17.6. This Court should follow *Tucker*, *Lian*, and *Pinckney*, adopt section 17.6, and hold the Millers liable to Johnson.

The Millers, to be sure, have argued that this Court has already rejected section 17.6. This is incorrect.

For this incorrect proposition, the Millers rely on *Sjogren*, 118 Wn. App. 144. Reliance on *Sjogren* is wholly unpersuasive. There, a tenant's guest had been injured in a darkened stairway, a situation that this Court held to "fit within" Restatement (Second) of Torts section 343A. Section 343A allows for liability when there is an "open and obvious" condition that a reasonable person would expect a visitor to overlook. *Id.* at 149. The Court reversed for trial on that issue. The plaintiff in *Sjogren* also

raised the question of liability under Restatement (Second) of Property section 17.6. This Court "decline[d]" to adopt the provision, but it did so because *other, already existing duties* applied to the case. *Id.* at 151. In enumerating the "several reasons" it did not apply section 17.6 of the Restatement (Second) of Property, the Court said:

> First, the dangerous condition in *Lian* was not in a common area. Thus, the landlord's common law duty to maintain common areas in reasonably safe condition did not apply. Here, it does . . . . Second, the decrepit stairs in *Lian* were well known . . . . Because of this, the tenant [would have] had to meet the landlord's defense that the stairs were an obvious dangerous condition. Here, there is at least an issue of fact as to whether the darkened stairs were an obvious danger. And more importantly, Sjogren fits within the limited circumstances of Restatement (Second) of Torts, section 343A, under which an obvious danger does not automatically bar her recovery.

Id. In other words, this Court felt that under the circumstances of *Sjogren*, there was no need to reach the novel question presented by section 17.6. It declined to apply section 17.6 because there was no need to reach the issue in order to decide the case. But neither did the Court reject section 17.6. Instead, it simply applied settled law and left the section 17.6 question unresolved.

That *Sjogren* left the question open is confirmed by this Court's decision two years later in *Pruitt v. Savage*, 128 Wn. App. 327, 115 P.3d

1000 (2005). After citing *Sjogren* and noting that section 17.6 had not yet been adopted, *Pruitt* declined to decide the section 17.6 question:

> Neither party cites or discusses the authorities, if any, on which it is based. Neither party identifies or discusses any of the competing policy considerations that should be considered and addressed when deciding whether to extend the warranty of habitability to third persons other than the tenant. Given this paucity of briefing on what might be a significant question, we decline to address that question in this case.

Pruitt, 128 Wn. App. at 332. If *Sjogren* had rejected section 17.6, *Pruitt* would not have had to decline to decide whether section 17.6 should be adopted.

Naturally, if this Court concludes that it *has* rejected landlord liability, it should overrule that holding. This Court can, of course, overrule its own precedent if that precedent is demonstrably incorrect or harmful. *See State v. Zimmerman*, 130 Wn. App. 170, 175 n.4, 121 P.3d 1216 (2005); *see also State v. Giles*, 132 Wn. App. 738, 741, 132 P.3d 1151 (2006) ("diverg[ing]" from a past holding to "follow Division Three's rationale"). And in any event, the many "policy considerations" favoring the adoption of section 17.6, *Pruitt*, 128 Wn. App. at 332, and the many reasons that a contrary ruling would be demonstrably incorrect and harmful, are discussed below. *See infra* Part II.E. The question that *Pruitt* declined to decide is now squarely presented.

3. *Other jurisdictions would likewise make the Millers liable to Johnson.*

Other states also recognize landlord liability to tenants' guests. *See In re Welfare of Colyer*, 99 Wn.2d 114, 119, 660 P.2d 738 (1983) ("As this is a case of first impression . . . , we look to other jurisdictions for information and guidance."). Like Washington, the "vast majority of states recognize that a landlord has a duty," enforceable in tort, "to maintain rental property in a safe, habitable condition." *Merrill v. Jansma*, 86 P.3d 270, 281 (Wyo. 2004); *see also id.* at 279–80 (citing a string of cases from different jurisdictions imposing "negligence principles" on landlords). An increasing number of states hold that this duty—whether it arises under an implied warranty of habitability, under a landlord-tenant statute, or under a general duty of reasonable care—runs to, and is enforceable by, tenants' guests or other third parties.[8]

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[8] *See Sauve v. Winfree*, 985 P.2d 997, 1002 (Alaska 1999); *Ford v. Ja-Sin*, 420 A.2d 184, 186–88 (Del. Super. Ct. 1980); *Scott v. Garfield*, 912 N.E.2d 1000, 1005 (Mass. 2009); *Young v. Garwacki*, 402 N.E.2d 1045, 1047–50 (Mass. 1980); *Shump v. First Cont'l-Robinwood Assocs.*, 644 N.E.2d 291, 296–97 (Ohio 1994); *Turpel v. Sayles*, 692 P.2d 1290, 1291–93 (Nev. 1985); *Sargent v. Ross*, 308 A.2d 528, 530–34 (N.H. 1973); *Pagelsdorf v. Safeco Ins. Co. of Am.*, 284 N.W.2d 55, 59–61 (Wis. 1979); *Merrill*, 86 P.3d at 287–89; *see also Thompson v. Crownover*, 381 S.E.2d 283, 285 (Ga. 1989) (endorsing Restatement (Second) of Property section 17.6); *Gregory v. Fourthwest Invs. Ltd.*, 754 P.2d 89, 91–92 (Utah. Ct. App. 1988) (in personal-injury action brought by a third-party visitor to rental premises, recognizing the

E. Common sense, justice, and policy strongly favor allowing injured guests to recover against landlords who negligently violate their statutory duties or the implied warranty of habitability.

Allowing Johnson to recover for his injuries is not just mandated by "logic" and "precedent," but also endorsed by "considerations of . . . common sense, justice, [and] policy." *Snyder*, 145 Wn.2d at 243 (quotation marks and citation omitted). There are three considerations of common sense, justice, and policy that particularly favor recognizing liability in these circumstances.

1. Recognizing a duty of care reflects the realities of the relationship among landlord, tenant, and guest.

"The common law has been determined by the needs of society and must recognize and be adaptable to contemporary conditions and relationships." *Strode v. Gleason*, 9 Wn. App. 13, 17, 510 P.2d 250 (1973) (Callow, J.). Here, contemporary—indeed, longstanding—conditions and relationships militate in favor of a duty of care. It is the rare tenant, after all, who does *not* invite guests to visit. The tenant's guests, in turn, trust implicitly in the duties imposed by the RLTA and the implied warranty of habitability, and so will reasonably expect that their friend's home has been kept safe. To recognize that residential landlords have a duty to their

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landlord's duty of reasonable care but holding that plaintiff had not shown landlord to have been negligent).

tenants' guests is to do no more than recognize social reality. *See Scott v. Garfield*, 912 N.E.2d 1000, 1005 (Mass. 2009) (resting its conclusion partly "on the expectation that a tenant might invite a guest into his home, and the concomitant expectation that the tenant's home must be safe for a guest to visit").

2. *The landlord—and not the tenant or the guest—is best placed to avoid the risk of injury.*

This appeal asks who will bear the risk of injury when a landlord negligently violates the RLTA or the implied warranty of habitability. If landlords like the Millers are deemed to owe guests like Johnson a duty, then landlords who negligently violate the RLTA or the implied warranty of habitability will bear the risk of injury. If, on the other hand, landlords are deemed to owe no duty to guests, then guests will bear the risk of injury. Whether this Court should recognize the Millers' duty to Johnson depends in part on who is best able to avoid that risk. *See Collins v. Boeing Co.*, 4 Wn. App. 705, 715, 483 P.2d 1282 (1971) (Horowitz, C.J.) (employer was not liable for a third person's theft of employee's tools because employee could have easily avoided the risk of theft); *Palmer v. Massey-Ferguson, Inc.*, 3 Wn. App. 508, 516, 476 P.2d 713 (1970) ("Risk of loss should transfer to the party best able to bear or spread it.").

Here, it is the Millers—not Johnson, and not the Millers' tenants—who were best placed to avoid the risk of injury. The Millers have a statutory right to enter the premises and make repairs. RCW 59.18.150(1). Existing law already required them to ensure that the residence complied with the implied warranty of habitability and the requirements of the RLTA. *See* RCW 59.18.060(5); *Foisy*, 83 Wn.2d at 27-28. Further, because they were the owners of the premises, they had a long-term incentive to make repairs to ensure that the premises would retain their value. Because a tenant does not share this incentive, and rarely shares the landlord's knowledge and resources, it is the landlord and not the tenant who should bear a guest's risk of injury. "[T]he tenant, who often has a short-term lease, limited funds, and limited experience dealing with such defects, will not be inclined to pay for expensive work on a place he will soon be leaving." *Young v. Garwacki*, 402 N.E.2d 1045, 1049 (Mass. 1980); *see also Foisy*, 83 Wn.2d at 27 (a tenant "usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs like the 'jack-of-all-trades' farmer who was the common law's model of the lessee. . . . Low and middle income tenants, even if they were interested in making repairs, would be unable to obtain any financing for major repairs since they have no long-term interest in the property."

(quoting *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1078 (D.C. Cir. 1970))).

Even less should the tenant's *guest* bear the risk of injury. The guest lacks any right of control over the premises. Indeed, because the guest lacks the tenant's familiarity with the premises, the guest cannot know what dangers lurk in the premises and how to avoid them. In that sense, the argument for a guest's right of recovery is actually *stronger* than the argument for a tenant's.

Of all three potential risk-bearers—landlord, tenant, and guest—it is the landlord who is best positioned to avoid risk by exerting reasonable care to notice and repair defects that violate the RLTA or the implied warranty of habitability.

3. Recognizing the Millers' duty to Johnson would not expand landlords' obligations at all, and would leave their potential liability limited.

This Court, like the *Lian*, *Tucker*, and *Pinckney* courts, should adopt Restatement (Second) of Property section 17.6. Under that section, the scope of a landlord's potential liability to a guest is limited.

Section 17.6 only imposes liability for violations of the implied warranty of habitability or statutory duties such as those in the RLTA. *See* Restatement (Second) of Property § 17.6. Landlords are already under a duty to conform their rental premises to the implied warranty of

habitability and to the requirements of the RLTA. Recognizing liability here would not require landlords to do anything they are not already doing.

Nor does section 17.6 leave a landlord open to indeterminate liability. The scope of liability is quite limited. Section 17.6 recognizes liability to only two classes of people: tenants and "others upon the leased property with the consent of the tenant or his subtenant." *Id.* The liability it recognizes, moreover, is based only on negligent violations of the RLTA and the implied warranty of habitability, rather than a generalized duty of reasonable care.

CONCLUSION

Logic, precedent, policy, common sense, and justice all point to one conclusion: when landlords negligently fail to correct a dangerous condition that violates the RLTA or the implied warranty of habitability, and that condition injures a tenant's guest, the landlords are liable to the guest. Here, John Johnson suffered injuries because the Millers negligently failed to correct several dangerous conditions that each violated the RLTA or the implied warranty of habitability. This Court should reverse the Superior Court's judgment in favor of the Millers and remand this case for trial. Johnson should also be awarded his costs on appeal.

APPENDIX

practices condemned here were initiated."

It is our conclusion that the recommendation of the board was justified under the facts of this case.

The respondents should be, and they hereby are, suspended from the practice of law for a period of one year, commencing thirty days after the filing of this order.

FINLEY, C. J., and HILL, WEAVER, OTT, FOSTER, HUNTER and DONWORTH, JJ., concur.

Nina G. ROSSITER, Appellant,
v.
Leo MOORE, Respondent.
No. 36105.

Supreme Court of Washington,
Department 1.
March 29, 1962.

Action by tenant's guest against landlord for injuries sustained in a fall off a porch from which landlord had removed railing. The Superior Court, Asotin County, Thomas G. Jordan, J., entered summary judgment in favor of landlord, and the guest appealed. The Supreme Court, Foster, J., held that a genuine controversy on a material issue was presented precluding granting of summary judgment, when there was no showing that there either was or was not an oral agreement by landlord to replace the railing.

Reversed.

1. Landlord and Tenant ⇐152(1)

A landlord's oral agreement to repair is valid.

2. Judgment ⇐185(2)

Burden is upon party moving for summary judgment to show that there is no genuine dispute of a material fact and such burden cannot be shifted to the adversary.

3. Pleading ⇐48

A complaint is sufficient if it contains a short and plain statement of claim showing that pleader is entitled to relief and a demand therefor.

4. Pleading ⇐354(17)

A motion to dismiss for failure to state a claim can be granted only if it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

5. Judgment ⇐181(24)

A genuine controversy on a material issue was present in action by guest of tenant against landlord for injuries sustained when guest fell off porch from which iron railing had been removed by landlord while tenant was moving in, precluding granting of summary judgment, when there was no showing that there either was or was not an oral agreement by landlord to replace the railing.

6. Landlord and Tenant ⇐164(1), 167(8)

In absence of a covenant to repair, landlord is not liable to a tenant or his guest for a condition which existed at beginning of tenancy.

7. Landlord and Tenant ⇐164(1), 167(8)

Independent of the law of landlord and tenant, a landlord is liable to his tenant or tenant's guest for his affirmative acts of negligence.

8. Landlord and Tenant ⇐164(1)
Negligence ⇐1

Rights and liabilities of parties under law of landlord and tenant and negligence are not mutually exclusive.

9. Judgment ⇐181(24)

Possibility of existence of an implied obligation on part of landlord, who removed porch railing while tenant was moving in, to replace it after the completion of moving, precluded granting of summary judgment in an action by tenant's guest against landlord for injuries sustained in fall off porch.

Sharp & Bishop, Clarkston, McCarthy & Adams, Lewiston, Idaho, for appellant.

S. Dean Arnold, Clarkston, Clements & Clements, Lewiston, Idaho, for respondent.

FOSTER, Judge.

Appellant, plaintiff below, appeals from a summary judgment for the respondent, defendant below, in a personal injury action. The long and the short of the matter is that such judgment must be reversed because the factual showing fails to demonstrate the absence of a genuine controversy on material issues.

Appellant was a social guest at the home of respondent's tenant, Edmund Carey, on February 16, 1960, on which occasion she fell from the back porch. The residence, owned by respondent Moore, was orally rented to Carey on a month-to-month tenancy beginning December 5, 1959. Before Carey moved into the house, respondent Moore gratuitously removed the iron railing from the back porch and said that he would store it at his own home until his tenant had completely moved in. It is inferable that the railing was designed as a permanent fixture although it could be removed and replaced at will "so as to enable the tenants to move their furniture from the carport and into the house through the back door."

This was appellant's first visit to the Carey home, and she was completely unfamiliar with its condition. Upon leaving the house, she fell from the back porch, which fall is attributed to the absence of the railing.

[1] While it conclusively appears that there was no written lease, and that Carey's tenancy was pursuant to an oral agreement, the showing, both in support of and in opposition to the motion for summary judgment, does not touch the existence or nonexistence of any oral agreement concerning the removal of the railing or its replacement. The record is completely silent. An oral agreement to repair is just as valid as a written one.[1]

[2] The burden is upon the party moving for summary judgment to show that there is no genuine dispute of a material fact, and this burden cannot be shifted to the adversary. Professor James William Moore, 6 Moore's Federal Practice 2123, ¶ 56.15 [3], says:

> "The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to judgment as a matter of law. * * *"

Accord: Professor Charles Alan Wright's revision of 3 Barron & Holtzoff, Federal Practice & Procedure (Rules ed.) 138, § 1235; Preston v. Duncan, 55 Wash. 2d 678, 349 P.2d 605.

The granting of the summary judgment when there is absolutely no showing that there either was or was not an oral agreement to replace the railing cannot stand. It completely ignores the sole function of the modern device.

[3, 4] While we are considering only the claimed error in the entry of summary judgment, and not a motion to dismiss for failure to state a claim upon which relief can be granted, nevertheless, it should be remembered that it is no longer necessary to plead the facts constituting a "cause of action." This term has disappeared from our jurisprudence. It is sufficient if the complaint contains a short and plain statement of the claim showing that the pleader is entitled to relief and a demand therefor. A motion to dismiss for failure to state a claim can be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Sherwood v.

1. Rowland & Sons v. Bock, 150 S.C. 490, 148 S.E. 549; Stapp v. Madera Canal & Irrigation Co., 34 Cal.App. 41, 166 P. 823; Good v. Von Hemert, 114 Minn. 393, 131 N.W. 466; Gary v. Spitler, 10 Tenn. App. 34.

Moxee School District No. 90, 158 Wash. Dec. 349, 363 P.2d 138.

[5, 6] Summary judgment was entered because there was no written contract to replace the railing and, in the absence of a covenant to repair, the landlord was not liable to the tenant or his guest for a condition which existed at the beginning of the tenancy.

[7, 8] But this overlooks the controlling principle that, independent of the law of landlord and tenant, a landlord is liable to his tenant or the tenant's guest for his affirmative acts of negligence. The rights and liabilities of the parties under the law of landlord and tenant and negligence are not mutually exclusive. Dean Bohlen explains it as follows:

> "The liability for negligence in performing a gratuitous undertaking is not contractual or even consensual but is essentially a Tort liability. * * *
>
> "* * * No man is bound to aid or benefit another, in the absence of some peculiar relationship or an express agreement given upon a sufficient consideration. Therefore mere inaction cannot create liability, but liability for the consequence of action is a very different matter. If a man chooses to act, he must so act as not to create an undue risk of injury to others. If he consciously interjects himself into the affairs of others, he must take care that his interference shall not unduly endanger them, and while he is not bound to protect or benefit his neighbor, he must not so act as to change his position for the worse. The person voluntarily and gratuitously making repairs upon another's premises, whether as landlord or in any other capacity, whether the premises are occupied by his tenant or by an owner, is therefore bound to take reasonable care therein, so that his act may not endanger those whom he should expect to use the premises, and if he creates a danger and that danger results in injury, he is liable therefor." 35 Harvard L.Rev. 633, 650, 651.

Again, the matter is brought into very sharp focus by the Supreme Court of Oregon in Senner v. Danewolf, 139 Or. 93, 293 P. 599, 6 P.2d 240. It stated the problem in the following paragraph:

> "The real question presented by the record in this case is: Is the landlord liable to the guests or invitees of his tenants upon the demised premises by reason of a dangerous condition of the premises which existed at the time of leasing and of which both landlord and tenant had knowledge, but of which the injured guest or invitee was ignorant?"

It stated the applicable rule of law as follows:

> "Reasonable minds will agree that the construction of the pavement between the driveway and the building would lead one to believe that it was intended for a sidewalk. It was an invitation to anyone using the side door as an exit to turn either to the right or left. That must have been the purpose of constructing steps. One would not likely step over a curb fourteen and one-half inches high when there were ordinary steps leading in either direction. If one's objective were the garages, he would naturally turn to the right and up the two steps. If his objective was to reach Failing street, just as naturally would he turn to the left and proceed in that direction using the four-inch step. When he stepped up the four-inch step, there was still a ten-inch curb dividing the paved space from the driveway. One would not be likely to step over a ten-inch curb to walk in a driveway manifestly constructed for the use of automobiles and just wide enough for the purpose intended.
>
> "The dangerous condition of the walk and open stairway existed at the time the premises were let and was brought about and entirely produced

by the landlord, and he remains liable for injury to third persons, lawfully on the premises, by reason of the dangerous condition which he created, notwithstanding the leasing. Bailey et al. v. Kelly, 86 Kan. 911, 122 P. 1027, 39 L.R.A.,N.S., 378; Larson v. Calder's Park Co., 54 Utah 325, 180 P. 599, 4 A.L.R. 731. The law is well and succinctly stated in:

"'Therefore, if any responsibility in this case attaches to the defendant, it cannot be based upon any contract obligation, but must rest entirely upon its *delictum*. If a landlord lets premises and agrees to keep them in repair, and he fails to do so, in consequence of which any one lawfully upon the premises suffers injury, he is responsible for his own negligence to the party injured. * * * If he creates a nuisance upon his premises, and then demises them, he remains liable for the consequences of the nuisance as the creator thereof, and his tenant is also liable for the continuance of the same nuisance. * * * And there is no distinction stated in any authority between cases of a demise of dwelling-houses and of buildings to be used for business purposes. The responsibility of the landlord is the same in all cases. If guilty of negligence or other *delictum* which leads directly to the accident and wrong complained of, he is liable; if not so guilty, no liability attaches to him.' Edwards v. N. Y. & H. R. R. Co., 98 N.Y. 245, 50 Am.Rep. 659; Copley v. Balle, 9 Kan.App. 465, 60 P. 656; See note to Griffin v. Jackson Light etc. Co., 92 Am.St.Rep. 499.

"'There is a wide distinction between acts lawful in themselves, done by one upon his own premises, which *may* result in injury to another if not properly done or guarded, and those which in the nature of things *must* so result. In the former case a party could only be made liable for actual negligence in the performance of the act or mode of maintaining it, while in the later case, he would be liable for all the consequences of his acts, whether guilty of negligence or not. The one act only becomes a nuisance by reason of the negligent manner by which it is performed or maintained, while the other is a nuisance *per se*.' Woods Law of Nuisances, 2d Ed., 141.

"In the instant case, it is admitted that the landlord had full knowledge of the condition of the premises at the time of leasing."

This is in accord with our own decisions: Greetan v. Solomon, 47 Wash.2d 354, 287 P.2d 721; McCourtie v. Bayton, 159 Wash. 418, 294 P. 238. Cf. Marks v. Nambil Realty Co., 245 N.Y. 256, 157 N.E. 129.

The trier of the fact may be justified in finding that the railing was a permanent improvement. An "appurtenance" has been defined:

"An *appurtenance* is:

"'That which belongs to something else; * * * something annexed to another thing more worthy; in common parlance and legal acceptation, something belonging to another thing as principal and passing as incident to it. * * *'" Smith v. Harris, 181 Kan. 237, 311 P.2d 325.

If the railing was a permanent improvement, it passed to the tenant.

"* * * The general rule is that appurtenances reasonably essential to the enjoyment of demised premises pass as an incident to them unless specially reserved. * * *" Fabrycky, Inc. v. Nad Realty Corp., 261 App.Div. 268, 269, 25 N.Y.S.2d 347, 349.

[9] The trier of the fact may conclude that the removal of the railing by the respondent implied an obligation to replace it after completion of the moving.

"The lease makes no reference to the right to place any signs upon the building, however, certain implied rights may be involved in a lease of

this nature. In many instances the law gives, by implication, certain rights in connection with the use and enjoyment of the premises unless express reservation is made by the landlord in this respect.

* * * * * *

"'The term "appurtenances" in a lease includes incorporeal easements, rights, and privileges, although not land, and gives to a tenant whatever is attached to, and used with, the premises as incident thereto and convenient or essential to the beneficiary's use or enjoyment thereof.' * * *" Lambros Metals v. Tannous, 71 Ariz. 53, 57, 58, 223 P.2d 570, 572.

The trial court erred in entering the summary judgment.

Reversed.

HILL, WEAVER, ROSELLINI and OTT, JJ., concur.

The DORIC COMPANY, a corporation, Respondent,

v.

KING COUNTY and A. A. Tremper, King County Treasurer, Appellants.

No. 36158.

Supreme Court of Washington, Department 1.

April 5, 1962.

Proceeding by taxpayer for recovery of amount of real estate excise tax paid under protest. The Superior Court, King County, F. A. Walterskirchen, J., entered judgment for taxpayer including interest and county appealed from portion of judgment for interest. The Supreme Court, Weaver, J., held that interest was properly allowed.

Affirmed.

Taxation ⇐543(8)

Interest was properly allowed to taxpayer for whom judgment was rendered for amount of real estate tax paid under protest. RCW 28.45.010 et seq.

Charles O. Carroll, Pros. Atty., James J. Caplinger, Chief Civil Deputy Pros. Atty., Lewis Guterson, Deputy Pros. Atty., Seattle, for appellants.

Rosling, Williams, Lanza & Kastner, William D. Cameron, Seattle, for respondent.

WEAVER, Judge.

In a prior appeal, this court reversed a summary judgment in favor of defendant county and remanded the case "* * * with direction to enter a judgment for the appellant [plaintiff] consistent with this opinion." The Doric Co. v. King County, 57 Wash.2d 640, 646, 358 P.2d 972, 975 (1961).

Thereupon, the trial court entered judgment for plaintiff in the sum of $23,463.63, the amount of the real estate excise tax levied, pursuant to RCW 28.45, and paid under protest by plaintiff, together with judgment for interest at six per cent from November 28, 1958. The county appeals from that portion of the judgment for interest.

This is not a question of first impression in this jurisdiction.

In Great Northern R. Co. v. Stevens County, 108 Wash. 238, 244, 183 P. 65, 67 (1919), the court reversed a judgment for defendant county and remanded the case, with instructions to enter judgment in favor of the railway company "* * * *with legal interest* from March 6, 1918, the date on which the railway company was compelled to and did pay the excessive and illegal tax * * *."

In Byram v. Thurston County, 141 Wash. 28, 45, 251 P. 103, 109, 252 P. 943 (1926), this court affirmed a judgment against the county for the return of "illegal and excessive" taxes "* * * with *interest* from the respective dates of payment." (Italics ours.) We have reviewed the ap-

It is undisputed here that Blake lived in Sue and Ray's household from 1989 through the date of the accident, except from December 1993 to perhaps May 1994. It is undisputed here that Blake lived in their household for the three or four months immediately preceding his accident. It follows that he was "a resident of the household" on the date of his accident.

IV.

I finish where I started. Although Penn–America had every right to limit "family" to persons related by blood or law,[57] this court does not. This court is obligated to identify each reasonable meaning of "family" that the average purchaser of insurance would understand, and to adopt that meaning most favorable to coverage. In August 1994, the average purchaser would *not* have understood "family" to mean *only* persons related by blood or law; on the contrary, he or she would have understood "family" to include a group like Ray, Sue, and Blake, whose members maintain close familial relationships. The latter understanding is the one most favorable to coverage, and the one |775we are obligated to adopt here. Therefore, I respectfully dissent.[58]

420, 1979 WL 52271 (1979) (liability insurance); David B. Harrison, Annotation, *Who is "Member" or "Resident" of Same "Family" or "Household," Within No Fault or Uninsured Motorist Provisions of Motor Vehicle Insurance Policy*, 96 A.L.R.3d 804, 1980 WL 130891 (1979) (no-fault and uninsured motorist provision), *superseded by* 66 A.L.R.5th 269, 1999 WL 149788.

57. This assumes no statutory or regulatory prohibition.

106 Wash.App. 811

|811**Susan LIAN, Respondent,**

v.

John STALICK, III and Jane Doe Stalick, husband and wife and the marital community composed thereof; & John J. Stalick, III as personal representative of the Estate of Jean D. Stalick, Deceased, Appellants.

No. 19485–0–III.

Court of Appeals of Washington,
Division 3,
Panel One.

June 19, 2001.

Tenant who was injured in fall on steps outside apartment unit brought suit against landlord. Following bench trial, the Superior Court, Spokane County, Robert Austin, J., entered judgment finding that landlord had breached warranty of habitability under Residential Landlord-Tenant Act (RLTA), and awarded $58,307.15 in special and general damages. Landlord appealed. The Court of Appeals, Brown, A.C.J., held that: (1) obviously decrepit, rotten, and inherently dangerous condition of steps constituted breach of warranty of habitability; but (2) RLTA could not support award of personal injury damages; (3) Restatement (Second) of Property provides a remedy through which tenant may recover for breach of implied warranty under RLTA; (4) appropriate remedy was a remand for additional findings, as was appropriate, solely on liability issues; and (5) damages award was not excessive or supported by insufficient evidence, and did not result in a lack of substantial justice.

Reversed and remanded.

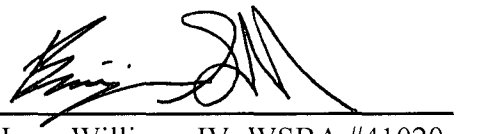
Sweeney, J., dissented and filed opinion.

58. I do not overlook, but I do reject, Penn–America's argument that Blake forfeited coverage by lying at his examination under oath. Given that he corrected the lie moments after making it, it will not support a forfeiture of coverage. If the case ever goes to trial, he can be impeached, in the discretion of the trial court, pursuant to ER 608(b).

APPENDIX 2

Respectfully submitted this November 29, 2012.

KELLER ROHRBACK L.L.P



Harry Williams IV, WSBA #41020
Benjamin Gould, WSBA #44093
Attorneys for Appellants

CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on November 29, 2012, I caused a true and correct copy of the foregoing BRIEF OF APPELLANTS JOHN AND JANET JOHNSON to be delivered as follows:

Carl R. Rodrigues LEHNER & RODRIGUES, P.C. 1500 SW First Avenue, Suite 1150 Portland, OR 97201 email: crodrigues@lrlawnw.com	❑ Hand Delivered ❑ Facsimile ☒ Email ☒ 1st Class Mail ❑ Priority Mail ❑ Federal Express, Next Day
Pamela A. Okano REED McCLURE Two Union Square 601 Union Street, Suite 1500 Seattle, WA 98101-1363 email: pokano@rmlaw.com	❑ Hand Delivered ❑ Facsimile ☒ Email ☒ 1st Class Mail ❑ Priority Mail ❑ Federal Express, Next Day
Gavin Flynn Attorney at Law 1112 Daniels Street, Suite 50 Vancouver, WA 98660 email: gavinflynn@comcast.net	☐ Hand Delivered ❑ Facsimile ☒ Email ☒ 1st Class Mail ❑ Priority Mail ❑ Federal Express, Next Day

Cathy A. Hopkins

Cathy A. Hopkins, Legal Assistant

1. **Landlord and Tenant ⇐125(1), 150(1)**

At common law, a landlord generally had neither a duty to provide habitable rental property, nor a duty to repair rental property.

2. **Landlord and Tenant ⇐125(1)**

Residential Landlord-Tenant Act (RLTA) does not create a generally actionable duty on the part of the landlord to keep the premises fit for human habitation; rather, the landlord's duties are limited to those specifically listed in RLTA. West's RCWA 59.18.060.

3. **Landlord and Tenant ⇐125(1)**

Application of the implied warranty of habitability under Residential Landlord-Tenant Act (RLTA) depends on the particular circumstances; generally, the warranty applies whenever the defects in a particular dwelling render it uninhabitable or pose an actual or potential safety hazard to its occupants. West's RCWA 59.18.060.

4. **Landlord and Tenant ⇐164(2)**

Obviously decrepit, rotten, and inherently dangerous steps outside apartment unit constituted a breach of implied warranty of habitability under Residential Landlord-Tenant Act (RLTA); landlord failed to maintain steps, which were a structural component of dwelling, in good repair so as to render them usable and capable of withstanding normal forces and loads, and did not keep them in as good a condition as they should have been at commencement of tenancy. West's RCWA 59.18.060(2, 5).

5. **Landlord and Tenant ⇐125(1)**

For violation of implied warranty of habitability under Residential Landlord-Tenant Act (RLTA) to exist, defects must constitute violations of the landlord's specific duties as set forth in RLTA. West's RCWA 59.18.060.

6. **Landlord and Tenant ⇐93, 150(5), 187(1)**

Tenant's remedies for a landlord's violation of Residential Landlord-Tenant Act (RLTA) are limited to (1) the tenant's right to repair and deduct the cost from the rent, (2) a decrease in the rent based upon the diminished value of the premises, (3) payment of rent into a trust account, or (4) termination of the tenancy. West's RCWA 59.18.060.

7. **Landlord and Tenant ⇐164(2)**

Landlord's breach of implied warranty of habitability under Residential Landlord-Tenant Act (RLTA), which arose from obviously decrepit, rotten, and inherently dangerous steps outside apartment unit, could not support award of personal injury damages in suit brought under RLTA by tenant who was injured in fall caused by condition of steps. West's RCWA 59.18.060.

8. **Landlord and Tenant ⇐164(1)**

Residential Landlord-Tenant Act (RLTA) does not bar a tenant from pursuit of remedies otherwise provided by law for the landlord's failure to carry out the duties required under RLTA. West's RCWA 59.18.060, 59.18.070.

9. **Landlord and Tenant ⇐164(1, 6, 7)**

In general, common law limits landlord's liability for harm to a tenant to that caused by (1) latent or hidden defects in the leasehold (2) that existed at the commencement of the leasehold, (3) of which the landlord had actual knowledge, and (4) of which the landlord failed to inform the tenant.

10. **Landlord and Tenant ⇐164(7)**

Obviously decrepit condition of steps outside apartment unit, which was known to both landlord and tenant, was not a latent defect, as would potentially permit landlord's failure to inform tenant of defect in condition steps to form basis for recovery in suit brought by tenant after she was injured in fall caused by steps.

11. **Negligence ⇐1037(4)**

While a possessor of land is ordinarily not liable to invitees for known or obvious dangers, liability will attach if the possessor should have anticipated the harm despite the invitee's knowledge or the obviousness of the danger. Restatement (Second) of Torts § 343A.

12. **Landlord and Tenant ⇐164(6, 7)**

Principle that, while a possessor of land is ordinarily not liable to invitee for known or

obvious dangers, liability will attach if the possessor should have anticipated harm despite invitee's knowledge or obviousness of danger, may in appropriate circumstances apply to portions of premises under control of a residential tenant; determinative issue is not so much location of defect, but whether the dangerous defect was so obvious that landlord should have anticipated harm even though tenant knew of defective condition, and consequently, a duty of care would exist if landlord should have anticipated harm despite tenant's knowledge of danger, or despite obvious nature of danger. Restatement (Second) of Torts § 343A.

13. Trial ⇐391

In a bench trial, it is unnecessary for a trial court to enter cumulative or alternative liability findings.

14. Landlord and Tenant ⇐164(3)

A botched voluntary repair by a landlord constitutes an affirmative act of negligence.

15. Landlord and Tenant ⇐164(1)

A landlord is subject to liability for physical harm caused to the tenant and others upon the leased property with the consent of the tenant or his subtenant by a dangerous condition existing before or arising after the tenant has taken possession, if he has failed to exercise reasonable care to repair the condition, and the existence of the condition is in violation of (1) implied warranty of habitability, or (2) a duty created by statute or administrative regulation; rule applies even when the dangerous condition occurs in an area of the premises under the control of the tenant, so long as the defect constitutes a violation of either the implied warranty of habitability, or a duty imposed by statute or regulation. Restatement (Second) of Property § 17.6.

16. Landlord and Tenant ⇐164(1)

Section of Restatement (Second) of Property allowing imposition of liability against a landlord for injuries caused to a tenant and others on leased property as result of a dangerous condition on premises provides a tenant a remedy through which he or she may recover for injuries caused by landlord's breach of implied warranty of habitability under Residential Landlord-Tenant Act (RLTA). West's RCWA 59.18.060; Restatement (Second) of Property § 17.6.

17. Appeal and Error ⇐1178(6)

Appropriate remedy following determinations by Court of Appeals that trial court had erred by allowing tenant to recover personal injury damages under Residential Landlord-Tenant Act (RLTA) for injuries sustained in fall caused by defective condition of steps outside apartment unit, but that violation of RLTA, and alleged negligence by landlord in attempting to repair steps, could potentially support recovery under Restatement (Second) of Torts, was a remand to trial court to enter additional findings, as would be appropriate, solely on liability issues. West's RCWA 59.18.060; Restatement (Second) of Property § 17.6.

18. Appeal and Error ⇐856(1)

Appellate court may affirm a trial court on an alternative theory if the briefing and the evidence support an appropriate theory.

19. Appeal and Error ⇐977(3, 5)

Appellate court reviews a trial court's decision to grant or deny a motion for reconsideration or new trial under an abuse of discretion standard. CR 59(a).

20. Appeal and Error ⇐946

A trial court abuses its discretion when its decision is manifestly unreasonable, or based on untenable grounds or reasons.

21. New Trial ⇐77(2)

For a grant of a new trial based on a claim of excessive damages to be warranted, the damages must be so excessive as to unmistakably indicate that the verdict was the result of passion or prejudice. CR 59(a)(5).

22. New Trial ⇐73

To warrant grant of motion for new trial on basis of excessive damages, the amount of damages must be so excessive as to be outside the range of evidence or so great as to shock the court's conscience, and the passion or prejudice must be of such manifest clarity as to make it unmistakable. CR 59(a)(5).

23. Appeal and Error ⇐933(4)

In reviewing trial court's ruling on motion for new trial based on insufficient evidence, court views the evidence in the record in the light most favorable to the nonmoving party to determine whether, as a matter of law, there is no substantial evidence or reasonable inferences to sustain the verdict for the nonmoving party. CR 59(a)(7).

24. Evidence ⇐597

Evidence is substantial, and thus is sufficient to sustain verdict, when it is of sufficient quantity to convince an unprejudiced, thinking mind of the truth of the declared premise.

25. New Trial ⇐76(4)

Award of $58,307.15 in special and general damages, including $30,000 for pain and suffering prior to surgery and $10,000 for pain and suffering following surgery, was not excessive or supported by insufficient evidence, and did not result in a lack of substantial justice, and thus did not warrant grant of new trial, in apartment tenant's suit against landlord to recover for injuries sustained in fall caused by defective condition of steps outside apartment unit. CR 59(a)(5, 7, 9).

26. Damages ⇐32

A plaintiff who substantiates her pain and suffering with evidence is entitled to general damages.

27. New Trial ⇐13

Granting of a new trial for lack of substantial justice should be rare, given the other broad grounds available under rule governing new trials. CR 59(a)(9).

|814 Byron L. McLean, Spokane, for Appellants.

Lloyd A. Herman, Lloyd Herman & Associates, Spokane, for Respondent.

BROWN, A.C.J.

Susan White, formerly Susan Lian, fell on the obviously decrepit steps of her apartment. She sued her landlord for injuries. Concluding the landlord breached the warranty of habitability under the Residential Landlord–Tenant Act, chapter 59.18 RCW (RLTA), the trial court awarded Ms. White special and general damages. Under subsequent case law, the trial court erred when deciding the scope of remedies available for that breach. Damages were properly decided. We reverse and remand for proceedings to decide if liability exists under common law liability theories.

FACTS

Jean Stalick (deceased) owned the Benson Motel Apartments, managed by her son, John Stalick, III (collectively Mr. Stalick). Susan White occupied one unit. The steps in front of Ms. White's unit were decrepit, rotten, and inherently dangerous. Ms. White and the Stalicks were aware of the step's poor condition. The trial court orally discussed allegations that complaints were made and repairs attempted and that the conditions caused Ms. White's fall and her injuries.

Ms. White filed a negligence complaint against Mr. Stalick. After a two-day bench trial, the trial court concluded Mr. Stalick breached the statutory duty to maintain safe premises under RCW 59.18.060. The trial court entered consistent findings of fact, conclusions of law, and |815 judgment in Ms. White's favor in the sum of $58,307.15 for special and general damages plus interest, attorney fees, and costs.

Mr. Stalick unsuccessfully filed a CR 59 motion for reconsideration, or alternatively, a new trial. Then, Mr. Stalick appealed.

ISSUES

Did the trial court err by (A) concluding Mr. Stalick breached RLTA's warranty of habitability, (B) ordering remedies exceeding those specified in the RLTA, or (C) deciding the amount of damages, apart from liability.

A. Warranty of Habitability

[1] Generally, at common law, a landlord had neither a duty to provide habitable rental property nor a duty to repair rental property. *Hughes v. Chehalis Sch. Dist. No. 302,* 61 Wash.2d 222, 225, 377 P.2d 642 (1963). This approach was abandoned in *Foisy v. Wyman,* 83 Wash.2d 22, 28, 515 P.2d 160

(1973). The *Foisy* court granted an implied warranty of habitability, finding support in the newly enacted RLTA. *Id.* at 28–29, 515 P.2d 160.

The RLTA provision relating to habitability partly states:

> The landlord will at all times during the tenancy keep the premises fit for human habitation, and shall in particular:
>
> (1) Maintain the premises to substantially comply with any applicable code, statute, ordinance, or regulation governing their maintenance or operation, which the legislative body enacting the applicable code, statute, ordinance or regulation could enforce as to the premises rented if such condition substantially endangers or impairs the health or safety of the tenant;
>
> (2) Maintain the roofs, floors, walls, chimneys, fireplaces, foundations, and all other structural components in reasonably good repair so as to be usable and capable of resisting any and all normal forces and loads to which they may be subjected;
>
> [S16](3) Keep any shared or common areas reasonably clean, sanitary, and safe from defects increasing the hazards of fire or accident;
>
> . . . .
>
> (5) Except where the condition is attributable to normal wear and tear, make repairs and arrangements necessary to put and keep the premises in as good condition as it by law or rental agreement should have been, at the commencement of the tenancy[.]

RCW 59.18.060.

[2] RCW 59.18.060 does not create a generally actionable duty on the part of the landlord to "keep the premises fit for human habitation." *See Aspon v. Loomis*, 62 Wash. App. 818, 825–26, 816 P.2d 751 (1991). Rather, the landlord's duties are limited to those specifically listed in RCW 59.18.060. *Id.*

Mr. Stalick, relying on *Klos v. Gockel*, 87 Wash.2d 567, 554 P.2d 1349 (1976), argues the RLTA warranty of habitability applies solely to defects rendering the dwelling uninhabitable. In *Klos*, a case involving new construction, the court reversed a judgment for violating the implied warranty of habitability on the basis that the owner-builder was not engaged in a commercial activity. *Id.* at 571, 554 P.2d 1349. In dictum, the *Klos* court noted "that the house was habitable at all times." *Id.* But the *Klos* dictum does not constitute a rule that the aggrieved occupant must abandon the residence before invoking the implied warranty of liability. *Luxon v. Caviezel*, 42 Wash.App. 261, 266 n. 4, 710 P.2d 809 (1985). Accordingly, we reject Mr. Stalick's proposed rule.

Relying on *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wash.2d 406, 415–16, 745 P.2d 1284 (1987), Mr. Stalick further contends the warranty of habitability does not apply to defects in exterior nonstructural elements adjacent to the dwelling. But *Stuart* does not offer the support Mr. Stalick seeks. In *Stuart*, the representatives of condominium owners brought suit against the owner-developer-builder-vendor of the complex for various construction defects affecting decks and access walkways. *Id.* at 410–11, 745 P.2d 1284. [S17]Regarding the access walkways, the Supreme Court reasoned "one could plausibly argue that the defects occurred in an essential portion of the dwelling itself." *Id.* at 417, 745 P.2d 1284. "Such a defect could be said to render a home unit unfit for its intended purpose." *Id.* The *Stuart* court remanded the matter so the trial court could determine "which units owned by such plaintiffs had walkways so impaired that the sole means of access to the unit was dangerous to negotiate." *Id.* at 422, 745 P.2d 1284.

While Ms. White aptly notes *Klos* and *Stuart* address solely the implied warranty of habitability in the builder/vendor to purchaser context, Mr. Stalick asserts correctly that *Stuart* has been cited with approval in cases involving the warranty of habitability under the RLTA. *See Howard v. Horn*, 61 Wash. App. 520, 525, 810 P.2d 1387 (1991); *see also Wright v. Miller*, 93 Wash.App. 189, 200–01, 963 P.2d 934 (1998), *review denied*, 138 Wash.2d 1017, 989 P.2d 1143 (1999) (citing both *Stuart* and *Howard* with approval). But, in *Atherton Condominium Apartment–Owners Association Board v. Blume Development Company*, 115 Wash.2d 506, 519–22, 799 P.2d 250 (1990), the Supreme Court de-

clined to apply *Stuart* as a general rule, reasoning it would interpret the applicability of the implied warranty of habitability on a "case-by-case basis." *Id.* at 520, 799 P.2d 250. Further, the policy grounds underlying the implied warranty of liability brought certain Uniform Building Code (UBC) code violations within the purview of the rule. *Id.* at 521–22, 799 P.2d 250. Specifically:

> The alleged building code violations are neither trivial or aesthetic concerns, nor those involving procedural breaches. Rather, the alleged building code violations concern fundamental fire safety provisions regarding the construction of Atherton's floors and ceilings. As such, the alleged defects are within the purview of the implied warranty of habitability and should not have been dismissed on summary judgment as a matter of law.

Atherton, 115 Wash.2d at 522, 799 P.2d 250 (footnotes omitted).

[3, 4] Therefore, application of the implied warranty of habitability depends on the particular circumstances. *Id.* at 520, 799 P.2d 250. ⌊818Generally, the warranty applies whenever the defects in a particular dwelling render it uninhabitable or pose an actual or potential safety hazard to its occupants. *Id.* at 522, 799 P.2d 250; *Stuart*, 109 Wash.2d at 416, 745 P.2d 1284. Thus, Mr. Stalick's general proposition that any breach of the warranty of habitability must entail a defect so severe as to render the dwelling uninhabitable is unpersuasive.

Mr. Stalick's other contention, that the warranty of habitability does not apply because the steps were not a structural part of the building, is equally unpersuasive. In *Stuart*, the Supreme Court reasoned that defective access walkways would trigger a plausible habitability claim; a dwelling lacking a safe means of access is unfit for its intended purpose. *Stuart*, 109 Wash.2d at 417, 745 P.2d 1284. Here, the rotting steps were directly attached and provided the sole means of access. The steps' condition was neither a trivial nor an aesthetic defect. *Atherton*, 115 Wash.2d at 522, 799 P.2d 250.

[5] In the RLTA context, the defects must constitute violations of the landlord's specific duties as set forth under RCW 59.18.060. *Aspon*, 62 Wash.App. at 825–26, 816 P.2d 751. Here, the uncontroverted facts show the steps failed to comply with the UBC. RCW 59.18.060(1). Substantial evidence shows Mr. Stalick failed to maintain the steps, as a structural component of the dwelling, in good repair so as to render them usable and capable of withstanding normal forces and loads. RCW 59.18.060(2). And it is obvious Mr. Stalick failed to put the steps in as good condition, as required by law, as they should have been at the commencement of the tenancy. RCW 59.18.060(5). Accordingly, the trial court did not err in finding Mr. Stalick in breach of the implied warranty of habitability under RCW 59.18.060.

B. Remedies and the RLTA

[6] We asked for additional briefing on *Dexheimer v. CDS, Inc.*, 104 Wash.App. 464, 17 P.3d 641 (2001), a case not available to the trial court when this matter was tried. In *Dexheimer* we held a tenant's remedies for a landlord's ⌊819violation of the RLTA are limited to " '(1) the tenant's right to repair and deduct the cost from the rent, (2) a decrease in the rent based upon the diminished value of the premises, (3) payment of rent into a trust account, or (4) termination of the tenancy.' " *Dexheimer*, 104 Wash.App. at 471, 17 P.3d 641 (quoting *Howard*, 61 Wash.App. at 524–25, 810 P.2d 1387). Significantly:

> The RLTA represents a series of compromises between the interest of the modern-day landlord and the tenant. The tenant benefits from the imposition of specific affirmative duties imposed upon the landlord. Those duties effect the RLTA's implied warranty of habitability. RCW 59.18.060. And the RLTA remedies provide tenants with far more protection than existed at common law. William H. Clarke, *Washington's Implied Warranty of Habitability: Reform or Illusion?*, 14 Gonz. L.Rev. 22–24 (1978). The landlord benefits because while the RLTA imposes a lengthy list of specific duties, it also limits the remedies available to the tenant for the breach of those duties. *Howard*, 61 Wash.App. at 524–25, 810 P.2d 1387.

Dexheimer, 104 Wash.App. at 471, 17 P.3d 641.

[7] In *Dexheimer*, the trial court committed reversible error by instructing the jury in a negligence action under WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 130.06, (3D ED. SUPP. 1994)(WPI), the law of RCW 59.18.060. *Dexheimer*, 104 Wash.App. at 469–71, 17 P.3d 641. Here, the trial court relied on WPI 130.06 in its oral ruling when finding a breach of RCW 59.18.060. Report of Proceedings (RP) at 172. Although a bench trial, the situation is analogous to *Dexheimer*. Therefore, the trial court erred in awarding personal injury damages on the basis of a violation of RCW 59.18.060. While mentioning liability for tort in its oral opinion, the trial court did not grant relief under common law negligence, and did not consider contractual remedies because no contract existed here.

[8] On the other hand, the *Dexheimer* court did not preclude a negligence claim premised on the breach of a common law duty. *Id.* at 475, 17 P.3d 641. Moreover, the RLTA does not bar a tenant from "pursuit of remedies otherwise provided him by law" for the landlord's failure to carry out the duties [820] required under RCW 59.18.060. RCW 59.18.070. Some legal commentators have interpreted "remedies otherwise provided by law" to include a tort action for personal injuries caused by the landlord's breach of the RLTA. CLARKE, *supra*, at 39–40; WILLIAM B. STOEBUCK, *The Law Between Landlord and Tenant in Washington: Part I*, 49 WASH. L.REV. 291, 364–65 (1974).

[9, 10] Generally, Washington common law has limited the landlord's liability to a tenant for harm caused by

> (1) latent or hidden defects in the leasehold
>
> (2) that existed at the commencement of the leasehold
>
> (3) of which the landlord had actual knowledge
>
> (4) and of which the landlord failed to inform the tenant.

Frobig v. Gordon, 124 Wash.2d 732, 735, 881 P.2d 226 (1994).

> The latent defect theory does not impose upon the landlord any duty to discover obscure defects or dangers. Nor does it impose any duty to repair a defective condition. Under the latent defect theory, the landlord is liable only for failing to inform the tenant of known dangers which are not likely to be discovered by the tenant.

Aspon, 62 Wash.App. at 826–27, 816 P.2d 751 (citing *Flannery v. Nelson*, 59 Wash.2d 120, 123, 366 P.2d 329 (1961)). This general latent defect theory does not apply here because the obviously decrepit condition of the steps was a defect known to both Ms. White and Mr. Stalick.

[11] But, Ms. White relied on *Degel v. Majestic Mobile Manor, Inc.*, 129 Wash.2d 43, 50, 914 P.2d 728 (1996) at the trial court and here to argue that Mr. Stalick had a duty to protect tenants and other invitees because the defect was so obvious he could anticipate this specific harm. The *Degel* court reasoned that a possessor of land is ordinarily not liable to invitees for known or obvious dangers, but liability will attach if the possessor should have anticipated the harm despite the invitee's knowledge or the obviousness of the danger. *Id.*

[12] *Degel*, which involved a natural body of water [821] adjacent to a mobile home park, was decided in a common-area type of context. *Id.* at 46–47, 914 P.2d 728. But the underlying common law rule on which *Degel* is founded, Restatement (Second) of Torts § 343A(1) (1965), in appropriate circumstances, applies to portions of the premises under the control of a residential tenant. *See Anglin v. Oros*, 257 Ill.App.3d 213, 195 Ill.Dec. 409, 628 N.E.2d 873, 876 (1993) (finding no duty of care where landlord did not know of defective storm door and would not have anticipated harm to residential tenant's daughter). The determinative issue is not so much the location of the defect but whether the dangerous defect was so obvious that the landlord should have anticipated the harm even though the tenant knew of the defective condition. *Id.*, 195 Ill.Dec. 409, 628 N.E.2d at 877. Consequently, a duty of care would exist "if the landlord should have anticipated the harm despite the tenant's knowledge of the danger or despite the obvious nature of

the danger." *Degel*, 129 Wash.2d at 50, 914 P.2d 728.

[13] The trial court did not clearly address *Degel* in its written findings. Before *Dexheimer*, that would have been superfluous because it is unnecessary to enter cumulative or alternative liability findings. But, the trial court did state in its oral opinion that the steps "are not in compliance with any measure of safety, whatsoever." RP at 173. The court further noted the steps were not only visibly decrepit for all to see, but that Mr. Stalick failed "to at least have some modicum of safety." RP at 176. "I find that these steps are inherently dangerous and do violate the code; that they interfered with the safe habitation of the home." RP at 176.

[14, 15] Ms. White mainly contends Mr. Stalick had a duty to use ordinary care when carrying out repairs on the premises. A botched voluntary repair by the landlord constitutes an affirmative act of negligence. *See Rossiter v. Moore*, 59 Wash.2d 722, 725–26, 370 P.2d 250 (1962). Moreover, Restatement (Second) of Property § 17.6 (1977) states:

> A landlord is subject to liability for physical harm caused to the tenant and others upon the leased property with the [822] consent of the tenant or his subtenant by a dangerous condition existing before or arising after the tenant has taken possession, if he has failed to exercise reasonable care to repair the condition and the existence of the condition is in violation of:
>
> (1) an implied warranty of habitability; or
>
> (2) a duty created by statute or administrative regulation.

This rule applies even when the dangerous condition occurs in an area of the premises under the control of the tenant so long as the defect constitutes a violation of either the implied warranty of habitability or a duty imposed by statute or regulation. *See Thompson v. Crownover*, 259 Ga. 126, 381 S.E.2d 283, 285–86 (1989) (discussing room heater alleged to be in violation of code); *Richwind Joint Venture 4 v. Brunson*, 335 Md. 661, 645 A.2d 1147, 1152 (1994) (adopting Restatement (Second), *supra*, § 17.6 and holding private cause in action in landlord/tenant context may arise from landlord's breach of statutory duty); *Crowell v. McCaffrey*, 377 Mass. 443, 386 N.E.2d 1256, 1262 (1979) (applying rule to porch in violation of code and allegedly under control of tenant); *Shroades v. Rental Homes, Inc.*, 68 Ohio St.2d 20, 427 N.E.2d 774, 776–78 (1981) (discussing Restatement (Second) rule in context of defective stairs leading directly to injured tenants' apartment and holding cause of action in tort existed for landlord's breach of Ohio's version of RLTA); *Watson v. Sellers*, 299 S.C. 426, 385 S.E.2d 369, 370, 373–75 (Ct.App.1989) (citing Restatement (Second), *supra*, § 17.6 and South Carolina's RLTA with respect to tenant injuries caused by collapse of wooden front steps to mobile home).

[16] We find these authorities persuasive and now adopt Restatement (Second) of Property § 17.6. The rule provides the tenant a remedy, supported by public policy, through which he or she may recover for injuries caused by the landlord's breach of the RLTA. As the *Shroades* court noted with respect to Ohio's version of the RLTA, the preventative remedies contained in the statute may be "grossly inadequate" to compensate tenants for physical injuries caused by the landlord's breach of the [823] statute. *Shroades*, 427 N.E.2d at 777–78.

As noted earlier, the record shows the blatantly dilapidated steps constituted multiple violations of landlord duties imposed under RCW 59.18.060. Ms. White testified that Mr. Stalick made a desultory attempt at repair. The trial court noted Ms. White's repair allegation but entered no findings or conclusions on the subject.

[17, 18] Given all of the above, the best remedy is remand to the trial court to enter additional findings as may seem appropriate solely on the liability issues. *Bowman v. Webster*, 42 Wash.2d 129, 134–36, 253 P.2d 934 (1953). Additional reasons for remand are discussed in Part C. And, while we may affirm a trial court on an alternative theory if the briefing and the evidence support an appropriate theory, considering the impact of *Dexheimer*, in fairness to both sides, remand is indicated to allow clarification of liability

theories. *See Cotton v. City of Elma*, 100 Wash.App. 685, 696, 998 P.2d 339 (reasoning appellate court can affirm on alternative theory), *review denied*, 141 Wash.2d 1029, 11 P.3d 824 (2000); *Dexheimer*, 104 Wash.App. at 470, 17 P.3d 641 (discussing common law negligence and lease liability). Further, because briefing and evidence exists in the record below supporting Ms. White's claim of negligent repair, and there is no indication that the lack of a specific finding on the issue was deliberate, we decline the dissent's invitation to infer a negative finding against Ms. White. *See Douglas Northwest, Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wash.App. 661, 682, 828 P.2d 565 (1992). We defer to the trial court to resolve any fact and credibility issues regarding Ms. White's allegations on remand.

C. Damages

[19, 20] Now we discuss Mr. Stalick's motion for reconsideration/new trial on the issue of damages. If the damages award is tenable, further proceedings can focus solely on liability. We review a trial court's decision to grant or deny a CR 59(a) motion for reconsideration or new trial |824 under an abuse of discretion standard. *Kohfeld v. United Pac. Ins. Co.*, 85 Wash.App. 34, 40, 931 P.2d 911 (1997). "A trial court abuses its discretion when its decision is manifestly unreasonable, or based on untenable grounds or reasons." *Id.* Mr. Stalick argues three grounds for a new trial: first, excessiveness indicating the judgment resulted from passion or prejudice, CR 59(a)(5); second, insufficient evidence, CR 59(a)(7); and last, a lack of substantial justice, CR 59(a)(9).

[21, 22] "As to a motion for a new trial based on a claim of excessive damages, CR 59(a)(5), the damages must be so excessive as to unmistakably indicate that the verdict was the result of passion or prejudice." *Nord v. Shoreline Sav. Ass'n*, 116 Wash.2d 477, 486, 805 P.2d 800 (1991). The amount of damages must be "so excessive as to be outside the range of evidence or so great as to shock the court's conscience." *Id.* at 487, 805 P.2d 800 (citing *Rasor v. Retail Credit Co.*, 87 Wash.2d 516, 531, 554 P.2d 1041 (1976)). And the passion or prejudice "must be of such manifest clarity as to make it unmistakable." *Bingaman v. Grays Harbor Comty. Hosp.*, 103 Wash.2d 831, 836, 699 P.2d 1230 (1985) (citing *James v. Robeck*, 79 Wash.2d 864, 870, 490 P.2d 878 (1971)).

[23, 24] Regarding lack of evidence, we view the evidence in the record in the light most favorable to the nonmoving party to determine whether, as a matter of law, there is no substantial evidence or reasonable inferences to sustain the verdict for the nonmoving party. *Hizey v. Carpenter*, 119 Wash.2d 251, 271–72, 830 P.2d 646 (1992). Evidence is substantial when it is of sufficient quantity to " 'convince an unprejudiced, thinking mind of the truth of the declared premise.' " *Nord*, 116 Wash.2d at 486, 805 P.2d 800 (quoting *Cowsert v. Crowley Maritime Corp.*, 101 Wash.2d 402, 405, 680 P.2d 46 (1984)).

[25, 26] Here, Ms. White testified as to the circumstances of the fall, her injuries related to it, and tried to distinguish injuries sustained in the fall from any injuries incurred before or after. Expert medical testimony and documentation supported the $18,000 in special damages related to |825 the fall. Mr. Stalick presented no expert medical testimony challenging the necessity or reasonableness of Ms. White's medical treatment. *See Palmer v. Jensen*, 132 Wash.2d 193, 200, 937 P.2d 597 (1997). Moreover, "a plaintiff who substantiates her pain and suffering with evidence is entitled to general damages." *Id.* at 201, 937 P.2d 597. Ms. White's testimony added to the medical evidence establishes a basis for general damages. Thus, substantial evidence supported the awards for both special and general damages.

The trial court granted $30,000 for Ms. White's pain and suffering prior to surgery and $10,000 for pain and suffering that followed after discussing supporting evidence in the record. It concluded general damages for pain and suffering and loss of enjoyment of life were appropriate. The damage award was not so "flagrantly outrageous and extravagant" as to manifest passion or prejudice. *Bingaman*, 103 Wash.2d at 836, 699 P.2d 1230 (citing *Kramer v. Portland–Seattle Auto Freight, Inc.*, 43 Wash.2d 386, 395, 261

P.2d 692 (1953)). Given the trial court's discussion of the evidence, and its careful consideration of the extent of Ms. White's damages, we find no error. *See Nord*, 116 Wash.2d at 487, 805 P.2d 800.

[27] Granting a new trial for lack of substantial justice, CR 59(a)(9), should be rare, given the other broad grounds available under CR 59. *See Kohfeld*, 85 Wash.App. at 41, 931 P.2d 911. The weight of evidence and questions of credibility are the province of the finder of fact. *See Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wash.2d 22, 34, 891 P.2d 29 (1995). The trial court plainly found Ms. White's version of events and supporting evidence persuasive and rejected Mr. Stalick's contradicting evidence. Thus, there was no error.

CONCLUSION

The trial court decided liability for a breach of the warranty of habitability in the RLTA, but did not properly relate the breach to remedies available according to later decided case law. Thus, in fairness, remand for clarification [826] of the trial court's liability theory or theories supporting the remedies is required. Damage amounts were properly decided and remand is limited to establishing the extent of liability, if any, under common law liability theories for those damages. Accordingly, we reverse and remand for proceedings consistent with this opinion.

SWEENEY, J., and KATO, J., concur.

SWEENEY, J. (dissenting)

Susan Lian White fell from wooden steps leading into her apartment—and only her apartment—on July 3, 1996.

She sued John Stalick III and Jean Stalick (now deceased) for personal injury. In relevant part her complaint alleged that the Stalicks "operated and maintained the residential premises located at 1603 S. Royal, Apartment # 1, in a negligent and careless manner so as to cause the Plaintiff's injuries." Clerk's Papers (CP) at 5.

The parties do not dispute that the stairway serviced only Ms. White's apartment. It was not, therefore, a common area of this apartment complex.

The case was fully tried to the court. And following a favorable decision, Ms. White's attorney prepared findings of fact and conclusions of law, on his stationery, which the judge signed on May 12, 2000.

The findings of fact pertinent to our review are:

> 2. The steps in front of the unit of the Benson Motel Apartments occupied by the plaintiff Susan C. White were inherently dangerous and interfered with the safe habitation of the home;
>
> 3. The defendants, Jean Stalick and John Stalick, III, and the plaintiff, Susan C. White, were aware of the poor condition of the steps;
>
> 4. On the evening of July 3, 1996, the plaintiff Susan C. White fell on the steps in front of her apartment unit and injured herself. The cause of her fall was the decrepit and rotten nature of the steps[.]

CP at 51.

[827] The pertinent conclusions of law are:

> 1. The defendants, Jean Stalick and John Stalick, III, had a statutory duty to the plaintiff, Susan C. White, to keep the steps in front of her apartment unit in safe condition as a minimum for habitation. This duty, as imposed in RCW 59.18.060, further states:
>
> > The landlord will at all times during the tenancy keep the premises fit for human habitation, and shall in particular:
> >
> > (1) Maintain the premises to substantially comply with any applicable code, statute, ordinance, or regulation governing their maintenance or operation, which the legislative body enacting the applicable code, statute, ordinance or regulation could enforce as to the premises rented if such condition substantially endangers or impairs the health or safety of the tenant;
>
> 2. While not a common area, the stairs in front of the plaintiff Susan C. White's apartment unit were a necessary element of habitation and thus the defendants still

had a statutory duty to keep them in safe condition;

3. By not having the steps in a safe condition as a minimum for habitation, the defendants breached their duty to the plaintiff to comply with the code or even some modicum of safety;

. . . .

5. Judgment should be entered in favor of plaintiff Susan C. White (formerly Susan C. Lian). . . .

CP at 52.

STANDARD OF REVIEW

We review findings of fact to determine whether they are supported by substantial evidence. *Miller v. City of Tacoma*, 138 Wash.2d 318, 323, 979 P.2d 429 (1999). We review conclusions of law de novo. *Bishop v. Miche*, 137 Wash.2d 518, 523, 973 P.2d 465 (1999).

The question before us is whether the court's conclusions of law support a judgment against the landlord for general, |828 common law tort damages. They do not, based on well established Washington law.

LANDLORD LIABILITY AT COMMON LAW

A landlord's liability to the tenant, other than for a common area, is well settled. A landlord is liable for, and only for:

(1) latent or hidden defects in the leasehold

(2) that existed at the commencement of the leasehold

(3) of which the landlord had actual knowledge

(4) and of which the landlord failed to inform the tenant.

Frobig v. Gordon, 124 Wash.2d 732, 735, 881 P.2d 226 (1994); *Charlton v. Day Island Marina, Inc.*, 46 Wash.App. 784, 788, 732 P.2d 1008 (1987); *Aspon v. Loomis*, 62 Wash. App. 818, 826–28, 816 P.2d 751 (1991); *Dexheimer v. CDS, Inc.*, 104 Wash.App. 464, 475, 17 P.3d 641 (2001).

Any *affirmative duty* a landlord may have to maintain rental property does not extend to noncommon areas. The tenant is limited at common law to the "latent defect theory." *Aspon*, 62 Wash.App. at 826, 816 P.2d 751.

The Residential Landlord–Tenant Act [1] (RLTA) imposes a warranty of habitability. But it also specifies the remedy:

> Failure to carry out these duties gives rise to certain statutory remedies which are premised on the landlord having notice of the defect. Those remedies, however, are limited to (1) the tenant's right to repair and deduct the cost from the rent, (2) a decrease in the rent based upon the diminished value of the premises, (3) payment of rent into a trust account, or (4) termination of the tenancy.

Howard v. Horn, 61 Wash.App. 520, 524–25, 810 P.2d 1387 (1991); *Dexheimer*, 104 Wash. App. at 471, 17 P.3d 641. The majority cites to no Washington cases that would allow a tenant to recover for personal injuries based on a landlord's violation of the RLTA. And for good reason—there are none.

|829 Ms. White would have been well within her rights to stop paying the rent and move out, or to have had the stairs repaired at the landlord's expense. RCW 59.18.090(1), .100(3). Fear of retaliation is no excuse given the tenant's protection under the statute. RCW 59.18.240, .250. Indeed, there is a presumption of retaliation if the landlord takes adverse action toward the tenant in the 90 days after the tenant enforces her rights under the RLTA. RCW 59.18.250.

In sum, the trial court erred by predicating an award of general tort damages for personal injuries on violations of the RLTA. *Dexheimer*, 104 Wash.App. at 472, 17 P.3d 641; *Howard*, 61 Wash.App. at 524–25, 810 P.2d 1387.

NON–PERSONAL INJURY, NON–LANDLORD TENANT CASES

Reliance on cases adjudicating disputes between condominium owners and builder vendors over the quality of the construction and materials and the owner's right to damages

1. Chapter 59.18 RCW.

for "allegedly inferior stucco substitute" simply have no applicability to a claim against a landlord for personal injuries. The discussion, therefore, in *Atherton Condominium Apartment–Owners Association Board v. Blume Development Company,*[2] while interesting, is inapposite. The same is true for *Stuart v. Coldwell Banker Commercial Group, Inc.*[3] (condominium owners sought recovery for defects in private decks and walkways; court held that the implied warranty of habitability did not apply because the defects did not render the units unfit to occupy). These cases inform us of nothing pertinent to this dispute.

Likewise, those cases which recognize breach of an implied warranty of habitability as a defense to an unlawful detainer action have no applicability here. *Foisy v. Wyman,* 83 Wash.2d 22, 515 P.2d 160 (1973). This is not an unlawful detainer action. Had it been, then, of course, Ms. White could have asserted the Stalicks' breach of their implied [830] warranty of habitability as a defense to the action. *Id.* at 27, 515 P.2d 160.

Ms. White also relies on *Degel v. Majestic Mobile Manor, Inc.*[4] to support her claim. But the question in *Degel* was whether a landowner (in that case the owner of a mobile home park) owed a duty to its tenants to protect them from a "fast-flowing creek adjacent to the play area...." *Degel v. Majestic Mobile Manor, Inc.,* 129 Wash.2d 43, 45, 914 P.2d 728 (1996). The court articulated the dispositive issue as, "Is a landowner excused from the duty to exercise reasonable care to protect invitees from potentially dangerous conditions on the land solely because the danger is, in part, due to the risks which are inherent in a natural body of water?" *Id.* at 48, 914 P.2d 728.

It noted the landlord's affirmative obligation "to maintain *common areas* of the premises in a reasonably safe condition for the tenants' use." *Id.* at 49, 914 P.2d 728 (emphasis added). Even a cursory review of the issue statement and the court's general statement of the law shows that the question addressed in *Degel* is not the question presented here. Here, we are clearly *not* talking about a common area. And, more importantly, the bulk of the discussion in *Degel* focuses on whether a natural body of water can ever be an unreasonable risk which a landlord must protect against—protect against because the landlord has a duty of care to maintain common areas. *Id.* at 49–55, 914 P.2d 728.

REPAIRS

A landlord has no duty to repair noncommon areas absent an express covenant to repair. *Aspon,* 62 Wash.App. at 826, 816 P.2d 751. Both parties concede that there was no written lease between Ms. White and the Stalicks, nor did the Stalicks undertake any general duty to repair. The findings of fact, prepared by Ms. White, reflect no general duty to repair these premises. The Stalicks, then, had no contractual obligation to repair the stairs.

[831] And the Residential Landlord Tenant Act did not modify this common law rule. *Id.* at 827, 816 P.2d 751.

VOLUNTARY REPAIRS

A landlord is, of course, liable at common law if the landlord voluntarily undertakes repairs to a tenant's apartment and does so negligently. *Regan v. City of Seattle,* 76 Wash.2d 501, 505, 458 P.2d 12 (1969).

The problem with this argument, though, is that the findings of fact here are completely devoid of any finding that (1) the Stalicks undertook to repair the stairs; or (2) that they performed any repairs negligently (assuming they were undertaken).

And in fact the court's findings of fact preponderate against such a finding. The stairs "were inherently dangerous and interfered with the safe habitation of the home" (Finding of Fact 2); the defendants "were aware of the poor condition of the steps" (Finding of Fact 3). CP at 51.

2. 115 Wash.2d 506, 519–22, 799 P.2d 250 (1990).

3. 109 Wash.2d 406, 745 P.2d 1284 (1987).

4. 129 Wash.2d 43, 914 P.2d 728 (1996).

Nowhere in these findings, search as you might, will you find any reference to the affirmative negligence of the Stalicks by repairing the stairs negligently.

Likewise, the court's conclusions of law, which like the findings of fact were all prepared by Ms. White's counsel, also militate against a finding of any gratuitous undertaking to repair stairs, or negligent repair of those stairs having undertaken the repair. The court simply concluded that "[b]y not having the steps in a safe condition as a minimum for habitation, the defendants breached their duty to the plaintiff to comply with the code or even some modicum of safety" (Conclusion of Law 3). CP at 52.

If anything, these findings and conclusions suggest just the opposite of what is now being asserted, i.e., the Stalicks undertook to repair the stairs but did so negligently.

PRESUMPTION OF NEGATIVE FINDINGS OF FACT

It is well settled Washington law that the absence of a [832] finding of fact on a material issue is *presumptively* a negative finding *against* the party who bore the burden of proof. *Taplett v. Khela*, 60 Wash.App. 751, 759, 807 P.2d 885 (1991). There is no argument here that the burden of proof was with the plaintiff, Ms. White. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wash.2d 127, 135, 769 P.2d 298 (1989) ("general burden of proof rules requir[e] the plaintiff to prove all elements of the cause of action").

The evolution of this rule, like many common law rules, has been bumpy. It started out as a clear statement that the court need not make negative findings. And where such findings were absent, and the evidence controverted, the presumption was that the court found against the party having the burden of proof. *Maynard v. England*, 13 Wash.App. 961, 968, 538 P.2d 551 (1975) (citing *Schmitt v. Matthews*, 12 Wash.App. 654, 659, 531 P.2d 309 (1975)); *Eggert v. Vincent*, 44 Wash.App. 851, 856, 723 P.2d 527 (1986); *Fettig v. Dep't of Soc. & Health Servs.*, 49 Wash.App. 466, 478, 744 P.2d 349 (1987). And while there are good policy reasons why the absence of a finding should be construed as a negative finding, not the least of which is finality, there are also practical reasons:

> We consider it the prevailing party's duty to procure formal written findings supporting its position. Prevailing parties must fulfill that duty or abide the consequences of their failure to do so.

Peoples Nat'l Bank v. Birney's Enters., 54 Wash.App. 668, 670, 775 P.2d 466 (1989).

The first exception carved out of this general rule addressed those cases where the evidence was uncontradicted. *LaHue v. Keystone Inv. Co.*, 6 Wash.App. 765, 776, 496 P.2d 343 (1972). And this makes sense. Obviously if the trial court, or counsel, made a mistake and failed to include an obvious finding (obvious because the evidence is uncontradicted), then strict application to the rule would work an injustice.

LaHue's requirement of uncontradicted evidence gave [833] way to a more generous exception in *Douglas Northwest, Inc. v. Bill O'Brien & Sons Construction, Inc.*, where a negative finding was presumed unless "ample evidence to support the missing finding, and the findings entered by the court, viewed as a whole, demonstrate that the absence of the specific finding was not intentional." *Douglas N.W., Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wash.App. 661, 682, 828 P.2d 565 (1992). But we refuse to apply this presumption where the end result would be directly contrary to the evidence presented at trial. *See Tacoma Commercial Bank v. Elmore*, 18 Wash.App. 775, 778–79, 573 P.2d 798 (1977).

In *LaHue*, which recognized this exception, there was uncontradicted evidence contrary to a finding. *LaHue*, 6 Wash.App. at 775–76, 496 P.2d 343.

But here the facts were disputed. Mr. Stalick was called as an adverse witness by Ms. White's attorney and testified:

> Q. All right. And—had you ever tried to repair those stairs prior to July of 1996?
>
> A. No, sir.
>
> Q. Did you ever try to repair them after she fell in January of '96?
>
> A. There was—no repair work, sir.

Q. When was the last time you ever repaired those stairs?

A. I have never repaired them.

Q. And—so the only change in the condition from this picture that—prior to 4th of July weekend of '96, the only change is that the stair steps are not—are not—even on the one side where they're broken loose?

A. They were not broken loose prior to my going on vacation over the 4th of July.

Q. Okay. And you never repaired them prior to July 4th at any time?

A. I have not, personally.

Q. Did someone else try to?

A. I don't know. My mother would—would have to have thought for that. I don't know. I don't have any first-hand knowledge.

|834Q. Did anybody ask you to repair them before July 4th of 1996?

A. No, sir.

Report of Proceedings (RP) at 64–65.

Now, Ms. White testified to the contrary:

Q. And did he repair the steps?

A. At one time, he came, and he tried to nail—some of the nails were up. Stuck up. Like they needed to be pounded back down. But they wouldn't stay. So he tried putting in new nails. That wouldn't work. So he tried using screws, with a screw gun.

THE COURT: You did, or he did?

A. He did. But it would just split the wood.

. . . .

Q. Now, do you know why you fell in January of '96.

A. Well, it was hard to shovel, because of the nails that were sticking up, you couldn't shovel all the way across. You could shovel an area, there's nails. Little area, nails, so you are either walking on ice, or tons of nails. So, it was—slick. Couldn't get down to the wood.

RP at 97–98.

Even under the most generous of these standards, it cannot be said that either the court or counsel inadvertently, mistakenly, or absentmindedly failed to include a finding of fact that the Stalicks had voluntarily, but then negligently, undertaken repairs on these stairs. So, for me, the injustice here is to remand this case to permit the court or counsel to come up with a theory not seriously urged at trial, not supported by the findings of fact, and as I read them, not even supported by the evidence.

On the theory for which the case is being remanded for further findings, Ms. White would have to establish the following: (1) that the Stalicks voluntarily undertook to repair the stairway used exclusively to access her apartment; (2) that those repairs were negligently performed; and (3) that the negligent repair proximately resulted in |835her injuries. *See Regan*, 76 Wash.2d at 505, 458 P.2d 12 ("If a landlord negligently attempts to repair or is otherwise guilty of affirmative negligence on the premises he will not be excused from liability by virtue of the landlord-tenant relationship"). There is no finding of fact (in the findings prepared by Ms. White), which would support any of these required elements.

Whether the Stalicks here gratuitously undertook and then negligently performed repairs on these stairs would have been an essential component of Ms. White's cause of action. Here, that theory was not specifically alleged. Ms. White alleged instead a failure to maintain the premises in a habitable condition. And, again, there are no findings of fact or conclusions of law which could be said to remotely address this essential claim. The evidence on this issue is at best mixed. So even under the most liberal reading of the evidence, we should not say that the omission of a finding was inadvertent.

To simply remand on that question is to invite the trier of fact to "go find" some theory upon which to predicate a damage award. That is wrong. This case was fully tried by competent counsel. Findings of fact and conclusions of law were presented by the

lawyer for Ms. White and signed by the trial court. I have reviewed those findings of fact and conclusions of law, and under the law as it now exists in Washington, they do not support a judgment for Ms. White. We should then reverse and dismiss.

For these reasons I respectfully dissent.

107 Wash.App. 79

[79]**Shannon V. CHEEK, Appellant,**

v.

EMPLOYMENT SECURITY DEPARTMENT OF The STATE OF WASHINGTON, Respondent.

No. 19602-0-III.

Court of Appeals of Washington, Division 3, Panel Five.

June 21, 2001.

Unemployment compensation claimant who was denied benefits appealed decision of Employment Security Department. The Superior Court, Spokane County, Salvatore Cozza, J., dismissed petition for review. Claimant appealed. The Court of Appeals, Schultheis, J., held that claimant did not timely serve review petition on Department by serving it on attorney general.

Affirmed.

1. Administrative Law and Procedure ⇐663

An appeal from an administrative tribunal invokes the appellate, rather than the general, jurisdiction of the superior court.

2. Administrative Law and Procedure ⇐651, 663

Acting in its appellate capacity, the superior court is of limited statutory jurisdiction, and a party seeking to properly invoke its jurisdiction must meet all statutory procedural requirements.

3. Administrative Law and Procedure ⇐724, 725

The trial court does not acquire subject matter jurisdiction over an appeal from an agency decision unless the appealing party files the petition for review in superior court and serves the petition on all parties.

4. Social Security and Public Welfare ⇐639

Unemployment compensation claimant failed to timely serve petition for review on Employment Security Department, although claimant timely served petition on attorney general, and thus claimant could not invoke appellate jurisdiction of superior court, where attorney general was not yet attorney of record for Department at time petition was served. West's RCWA 34.05.542, 43.10.040.

5. Administrative Law and Procedure ⇐724

Substantial compliance with the service requirements of the Administrative Procedure Act (APA) does not invoke the appellate, or subject matter, jurisdiction of the superior court. West's RCWA 34.05.542.

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[80]Lawrence A. Weiser, Alan L. McNeil, University Legal Assistance, Spokane, for appellant.

Laura J. Watson, Asst. Atty. Gen., Olympia, for respondent.

SCHULTHEIS, J.

Shannon Cheek applied for unemployment benefits with the Employment Security Department for the State of Washington after she quit her job in order to [81]avoid a domestic violence situation. The benefits were denied and the denial was affirmed by the Office of Administrative Hearings as well as the Department Commissioner. Ms. Cheek filed a petition for review of the Commissioner's decision in the Spokane County Superior Court but it was dismissed for lack of jurisdiction. Ms. Cheek appeals the dismissal and requests attorney fees and costs. Be-

118 Wash.App. 246

[246]**Don TUCKER and Shalee Miller, individually; Shalee Miller, as the guardian and parent of Alan Miller and Robert Miller, both minors; and Don Tucker and Shalee Miller, as the guardians and parents of Cheyanne Tucker, a minor, Appellants,**

v.

Robert HAYFORD and Dakota Hayford, husband and wife, Respondents.

No. 21544-0-III.

Court of Appeals of Washington,
Division 3,
Panel Nine.

Sept. 4, 2003.

Tenants who became sick from drinking contaminated well water brought action against landlord for breach of contract, violation of Landlord-Tenant Act, and negligent misrepresentation as to water quality. The Superior Court, Benton County, Robert Swisher, J., dismissed, and tenants appealed. The Court of Appeals, Sweeney, J., held that: (1) actual notice to landlord of defect was not required; (2) allegation that health inspector had recommended annual tests of well supported tenants' claim for breach of major maintenance and repair covenant; and (3) Landlord–Tenant Act provided remedy for personal injury damages.

Reversed.

1. Landlord and Tenant ⇐154(2)

Actual notice to landlord of defect was not required in tenants' action for breach of repair covenant based on contaminated well water, where source of water was outside well, which the landlord had physical access to.

2. Landlord and Tenant ⇐130(3)

Allegation that drinking water from well was unsafe due to presence of bacteria supported claim for breach of covenant of quiet enjoyment of rental unit.

3. Landlord and Tenant ⇐130(2)

Unsafe drinking water renders a home uninhabitable, and that by definition interferes with the quiet enjoyment of the home.

4. Landlord and Tenant ⇐154(3)

Allegations that nitrite levels in well water were high, and that health inspector had recommended annual tests for bacteria in well, but they had not been done, supported tenants' claim for breach of major maintenance and repair covenant in rental lease after tenants became ill from drinking well water.

5. Landlord and Tenant ⇐125(1)

Allegations that drinking water in well had not been tested for five years prior to tenants' moving in, despite recommendation by health department that it be tested annually, supported claim for breach of implied warranty of habitability after tenants became ill from drinking well water, where landlord did not tell tenants about problems with well water, and landlord was aware that well was to be tested annually.

6. Landlord and Tenant ⇐125(1)

Landlord–Tenant Act provided remedy for personal injury damages arising from tenants' consumption of contaminated well water based on breach of requirement that landlord keep premises fit for human habitation. West's R.C.W.A. 59.18.090.

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[248]George B. Fearing, Kennewick, WA, for Appellants.

Jeffrey T. Sperline, Rettig, Osborne, Forgette, Kennewick, WA, for Respondents.

OPINION PUBLISHED IN PART

SWEENEY, J.

We again note that a claim for personal injuries by a tenant can be premised on three distinct legal theories: contract (a rental agreement), common law obligations imposed on a landlord, and the Washington Residential Landlord–Tenant Act of 1973 (Landlord–Tenant Act), chapter 59.18 RCW. In *Dex-*

APPENDIX 3

heimer v. CDS, Inc.[1] we concluded that the remedies available to a tenant under the Landlord–Tenant Act were limited to those outlined in the statute. We were wrong.

Here, the tenants claim that they became sick from drinking contaminated well water provided as part of their tenancy. The trial judge dismissed all of their causes of [249]action—contract, Landlord–Tenant Act, and common law—concluding that the Landlord–Tenant Act limited all rights to those specifically enumerated in the act. We conclude that the tenants' showing on summary judgment is sufficient to support causes of action based on contract, the Landlord–Tenant Act, and the common law. We therefore reverse the summary dismissal of their claims.

FACTS

Robert Hayford bought a lot and mobile home in Kennewick, Washington from Mike Kirby in 1994. A domestic well supplied water to the home.

The well water was tested on December 8, 1993. On March 15, 1994, the Benton Franklin District Health Department wrote to Mr. Kirby that: (1) the nitrate level of the well water was 8.8 mg/L;[2] (2) the well was free of bacterial contamination; (3) the sanitary seal was improperly installed and maintained; and (4) chemicals were stored within 100 feet of the well. And "to protect and improve" the water system, the health department recommended that: (1) the sanitary seal be properly installed; and (2) the chemicals be stored at least 100 feet from the well. The health department also recommended that the well be tested yearly:

> The Benton–Franklin District Health Department recommends that all wells be tested at least once a year for bacteriological quality and nitrates be tested every three years. The preceding information should be useful to you in evaluating the needs of your water system. A pamphlet on water quality has been enclosed for your information.

Clerk's Papers (CP) at 181.

Mr. Hayford "thumbed through" the report but depended on his real estate agent to call any problems to his attention. CP at 185. And the agent apparently did not.

[250]Mr. Hayford leased the home to Don Tucker and Shalee Miller (now Tucker) in October of 1998. Mr. and Ms. Tucker asked if the well water was drinkable. Mr. Hayford said it was as long as a "Brita" filter[3] was used. He said that the nitrates were a bit high.

The Tuckers have four children, one was born after they moved out of the home. The Tuckers signed a written residential lease prepared by Mr. Hayford. They ultimately extended the tenancy through August 1, 2000. The Tucker family all became ill. The family's pediatric nurse practitioner suggested that they test their well water. The test, dated March 28, 2000, showed bacteria in the water. The Tuckers told Mr. Hayford. He had the well repaired and that solved the problem.

The Tuckers moved out of the home on May 15, 2000. They sued Mr. Hayford for damages for personal injury arising from contaminated water. Mr. Hayford moved for summary judgment. The trial court concluded that the landlord's legal obligations were ultimately governed by the Landlord–Tenant Act. And, relying on our decision in *Dexheimer*, the judge concluded that the Tuckers were not entitled to personal injury damages under the act. He also concluded that Mr. Hayford had no notice of any defect. And he dismissed the Tuckers' complaint.

DISCUSSION

The Tuckers sued for damages based on their contract (obligation to perform major maintenance and repair, and covenant of quiet enjoyment); violation of the Landlord–Tenant Act; and negligent misrepresentation

1. 104 Wash.App. 464, 17 P.3d 641 (2001).

2. This amount is below the Environmental Protection Agency maximum contaminant level of 10 mg/L. Clerk's Papers (CP) at 180.

3. The "Brita" filter is a brand of home water filtration system, which consists of a pitcher, a reservoir and a filter. *Hazelhurst v. Brita Prods. Co.*, 295 A.D.2d 240, 241, 744 N.Y.S.2d 31 (2002). "The user of [this] filtration system pours tap water into the reservoir which gradually passes through the filter into the pitcher." *Id.*

as to the water quality. We evaluate the viability of each claim.

[251]STANDARD OF REVIEW

This is an appeal from summary judgment. So we engage in the same inquiry as the trial court. *Mountain Park Homeowners Ass'n, Inc. v. Tydings,* 125 Wash.2d 337, 341, 883 P.2d 1383 (1994). Summary judgment is appropriate "if the pleadings, depositions, ... [and] affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). "A material fact is one upon which the outcome of the litigation depends." *Clements v. Travelers Indem. Co.,* 121 Wash.2d 243, 249, 850 P.2d 1298 (1993). And we consider the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Mountain Park,* 125 Wash.2d at 341, 883 P.2d 1383. The burden is on the moving party to prove no genuine issue of material fact exists. *Jacobsen v. State,* 89 Wash.2d 104, 108, 569 P.2d 1152 (1977).

CONTRACT CLAIMS

[1] ***Obligations Imposed by This Contract.*** *Brown v. Hauge* spells out the contract exception to the general rule of nonliability:

> The tenant may recover for personal injuries caused by the landlord's breach of a repair covenant only if the unrepaired defect created an unreasonable risk of harm to the tenant. The *Restatement (Second) of Torts* § 357 (1965) provides that the lessor of land is liable if (a) the lessor has contracted to keep the land in repair; (b) the disrepair creates an unreasonable risk that performance of the lessor's agreement would have prevented; and (c) the lessor fails to exercise reasonable care in performing the agreement.

Brown v. Hauge, 105 Wash.App. 800, 804, 21 P.3d 716 (2001) (citation omitted). The contract defines the extent of the duty when a landlord's duty arises out of a covenant. *Id.*

Both the trial court and Mr. Hayford, here on appeal, rely on our decision in *Brown* for the proposition that the landlord must have notice of the "defect" before he is subject to liability. Mr. Hayford argues, and the trial court agreed, [252]that *Brown* is a general statement of the law on notice. We do not read our decision in *Brown* so broadly.

In *Brown* the landlord had notice of the tenant's problem (a high door sill). The holding in *Brown* turned on the *nature* of the claimed defect, not notice. The contract required the landlord to keep the common areas "reasonably clean and safe from defects increasing the hazards of fire or accident." *Brown,* 105 Wash.App. at 804, 21 P.3d 716. So, the court reasoned, the landlord was only obligated to do something about the door sill if it was unsafe. All agreed the door sill was *inconvenient* for the tenants, but nobody—not the landlord, the tenants, nor a state agent who inspected the premises for a residential adult care facility license—considered it *unsafe. Id.* at 802, 803, 805, 21 P.3d 716. The court ultimately held that the landlord would not be liable under the contract's safety provision because the door sill was not then unreasonably unsafe. *Id.* at 805, 21 P.3d 716.

Brown did rely on *Teglo v. Porter.*[4] *Brown,* 105 Wash.App. at 804, 21 P.3d 716. *Teglo* in turn adopted portions of the *Restatement of Torts* which are relevant to the claims here:

> "The lessor's duty to repair ... is not contractual but is a tort duty based on the fact that *the contract gives the lessor ability to make the repairs and control over them. ... Unless* the contract stipulates that the *lessor shall inspect the premises to ascertain the need of repairs,* a contract to keep the *interior* in safe condition subjects the lessor to liability if, but *only if, reasonable care is not exercised after the lessee has given him notice of the need of repairs.*"

Teglo v. Porter, 65 Wash.2d 772, 774–75, 399 P.2d 519 (1965) (emphasis added) (quoting RESTATEMENT OF TORTS § 357 cmt. a (1934)).

Notice then under this provision of the *Restatement* becomes an issue when the particular condition under consideration is *inside* the residence where the landlord has no

4. 65 Wash.2d 772, 399 P.2d 519 (1965).

right to enter. But that is not the case here. The source ¶253 of water here was an outside well, which the landlord had physical access to. Actual notice is not then required.

Here the lease includes (1) an express covenant of quiet enjoyment[5] and (2) requires that the lessor maintain and repair the leased premises.[6]

So the factual question is the usual threshold question where the claim has been dismissed on motion—whether the condition of this well interfered with their quiet enjoyment of the home, *or* whether the well required "major maintenance" as spelled out in the lease agreement.

[2] ***Quiet Enjoyment.*** No Washington case directly addresses the impact of drinking water on one's quiet enjoyment of his home. Washington does, however, recognize the relationship of water and habitability. In *State ex rel. Andersen v. Superior Court,* the court held that without water, a property is uninhabitable. *State ex rel. Andersen v. Superior Court,* 119 Wash. 406, 407–08, 205 P. 1051 (1922). And in *Mitchell v. Straith,* the court held that a water system that used an "unusual" approach, but did not affect the water quality, did not render the property uninhabitable. *Mitchell v. Straith,* 40 Wash. App. 405, 412, 698 P.2d 609 (1985). And in *Mathes v. Adams,* as the Tuckers point out, the Montana court ultimately held that unsafe drinking water renders a rental property uninhabitable. *Mathes v. Adams,* 254 Mont. 347, 353, 838 P.2d 390 (1992).

Other jurisdictions have also held that a property without potable water is uninhabitable.[7]

[3] ¶254 It is well settled that unsafe drinking water renders a home uninhabitable. And that by definition interferes with the quiet enjoyment of the home.[8] The Tuckers have made out an actionable claim for breach of the covenant of quiet enjoyment if we look at the evidence in the light most favorable to the Tuckers.

[4] ***Major Maintenance and Repair.*** A health inspector recommended that this well be tested at least annually for bacteria. The question then is whether a reasonable person knew or in the exercise of ordinary care should have known that this well should have been tested annually—as part of the major

5. Paragraph 3 of the residential lease provides: "Lessor covenants that on paying the rent and performing the covenants herein contained, Lessee shall peacefully and quietly have, hold, and enjoy the demised premises for the agreed term." CP at 126.

6. Paragraph 13 of the residential lease provides in relevant part: "Major maintenance and repair of the leased premises, not due to Lessee's misuse, waste, or neglect or that of his employee, family, agent, or visitor, shall be the responsibility of Lessor or his assigns." CP at 127.

7. *See, e.g., Ruane v. Cardinal Realty, Inc.,* 116 N.H. 321, 322, 358 A.2d 412 (1976) (noting in action involving breach of contract for construction and sale of home, "the common expectation is that [a home] will be supplied with water in reasonable amounts and reasonable quality so as to make the house habitable"); *McDonald v. Mianecki,* 79 N.J. 275, 298, 398 A.2d 1283 (1979) (holding that "the implied warranty of habitability encompasses the potability of the water supply" in case of sale of home by a builder-vendor); *Jeangmeat v. Jackie Hames Constr. Co.,* 576 P.2d 761, 765 (Okla.1978) (holding in case where well water was not drinkable, builder-vendor's implied warranty of habitability extends to a water well provided with a new home); *Forbes v. Mercado,* 283 Or. 291, 294, 583 P.2d 552 (1978) (finding where water had such a high iron content that it was not suitable for domestic purposes, the "seller impliedly warrants a dwelling with a usable water system because the dwelling is uninhabitable if the system is otherwise"); *JRD Dev. Joint Venture v. Catlin,* 116 Or.App. 182, 185, 840 P.2d 737 (1992) (refusing to set aside judgment on claim that tenant testified falsely where trial court found rental home uninhabitable due to contaminated drinking water and leaky septic system), *modified,* 118 Or.App 502, 848 P.2d 136 (1993); *Elderkin v. Gaster,* 447 Pa. 118, 130, 288 A.2d 771 (1972) (holding in vendor-builder lawsuit where well water had high concentrations of organic nitrates and contained unacceptable levels of synthetic detergent, "[w]hile we can adopt no set standard for determining habitability, it goes without saying that a potable water supply is essential to any functional living unit; without drinkable water, the house cannot be used for the purpose intended").

8. Leased premises are deemed "untenantable" for the purposes of constructive eviction under the quiet enjoyment covenant when "the premises are unfit for the purpose for which they are leased." 5 THOMPSON ON REAL PROPERTY § 40.22(c)(3)(i), at 144 (David A. Thomas ed., 1994). If the premises are "uninhabitable," they are certainly "untenantable."

maintenance of this home. Again, the evidence, viewed in a light most favorable to the Tuckers, includes high nitrate levels together with a recommendation for yearly bacteria testing. That is a sufficient showing to support a breach of the major maintenance and repair covenant of this lease, if proved.

[255] DUTIES AT COMMON LAW

[5] ***Traditional Common Law Landlord Liability.*** Common law landlord liability requires a showing: "(1) latent or hidden defects in the leasehold (2) that existed at the commencement of the leasehold (3) of which the landlord had actual knowledge (4) and of which the landlord failed to inform the tenant." *Frobig v. Gordon*, 124 Wash.2d 732, 735, 881 P.2d 226 (1994). The landlord need not discover obscure defects or dangers, nor does the law impose any duty to repair defective conditions. *Aspon v. Loomis*, 62 Wash. App. 818, 826–27, 816 P.2d 751 (1991). A "landlord is liable only for failing to inform the tenant of known dangers which are not likely to be discovered by the tenant." *Id.* at 827, 816 P.2d 751.

The Tuckers moved into this home in 1998. The well was last tested in 1993. It was not tested again until after the Tuckers tested it in 2000. But this was after the Tuckers got sick. It had not then been tested for the five years prior to the Tuckers' moving in despite a recommendation by the health department that it be tested annually. This well was not then maintained at the time the property was leased to the Tuckers. And the condition of the water was certainly hidden or latent as to the Tuckers. Mr. Hayford did not warn the Tuckers. Mr. Hayford was aware of the report that required the annual testing. The Tuckers have then raised an issue of fact—whether Mr. Hayford knew or should have known of this latent defect.

A "should have known" standard is enough since we have eased the strict requirement of actual knowledge. It is sufficient that the landlord knew or should have been able to identify a defect unknown to the tenant at the time of the initial tenancy. *Taylor v. Stimson*, 52 Wash.2d 278, 280–81, 324 P.2d 1070 (1958); *see also Johnson v. Dye*, 131 Wash. 637, 230 P. 625 (1924) (basing liability on constructive knowledge where landlord would have discovered the defect if he had made the repairs he was supposed to make near the defect).

[256] ***Implied Warranty of Habitability.***

> A landlord is subject to liability for physical harm caused to the tenant and others upon the leased property with the consent of the tenant or his subtenant by a dangerous condition existing before or arising after the tenant has taken possession, if he has failed to exercise reasonable care to repair the condition and the existence of the condition is in violation of:
>
> (1) an *implied duty of habitability;* or
>
> (2) *a duty created by a statute* or administrative regulation.

RESTATEMENT (SECOND) OF PROPERTY § 17.6 (1977) (emphasis added).

We adopted this section of the *Restatement* in *Lian v. Stalick.*[9] There, we recognized a cause of action for the implied warranty of habitability under the Landlord–Tenant Act according to subpart (1) of the *Restatement. Lian v. Stalick*, 106 Wash. App. 811, 822, 25 P.3d 467 (2001).

Lian then supports the Tuckers' cause of action under subpart (1) of section 17.6 of the *Restatement.*

RESIDENTIAL LANDLORD–TENANT ACT

[6] The Tuckers next argue that contrary to our holding in *Dexheimer v. CDS, Inc.*,[10] the Landlord–Tenant Act allows a remedy for personal injury damages.

The Uniform Residential Landlord and Tenant Act (Uniform Landlord–Tenant Act) was drafted by the National Conference of Commissions on Uniform State Laws in 1972. 5 THOMPSON ON REAL PROPERTY § 43.05(b), at 385 (David A. Thomas ed., 1994). While Washington made "substantial changes" to the Uniform Landlord–Tenant Act when it adopted its own Landlord–Tenant Act, our state's version still reflects a "strong [Uni-

9. 106 Wash.App. 811, 822, 25 P.3d 467 (2001).

10. 104 Wash.App. 464, 17 P.3d 641 (2001).

form Landlord–Tenant Act] influence." *Id.* at 385 & n. 649, 17 P.3d 641.

[257]The Uniform Landlord–Tenant Act abandoned the "conveyance" aspect of landlord/tenant law as unsuitable for modern times in favor of "an interdependent, or contract, view of lease covenants." *Id.* at 386, 17 P.3d 641 (citing Uniform Landlord–Tenant Act § 1.102 cmt.). The purpose of the Uniform Landlord–Tenant Act was twofold: " 'simplify, clarify, modernize and revise' " landlord and tenant law, and to " *'encourage landlords to maintain and improve the quality of housing.'* "[11] *Id.* (quoting Uniform Landlord–Tenant Act § 1.102) (emphasis added).

Washington's Landlord–Tenant Act. The Landlord–Tenant Act requires the landlord to "keep the premises fit for human habitation" and to particularly maintain the premises in substantial compliance with health or safety codes for the benefit of the tenant. RCW 59.18.060(1). It requires the landlord to make repairs, except in the case of normal wear and tear, "necessary to put and keep the premises in as good condition as it by law or rental agreement should have been, at the commencement of the tenancy." RCW 59.18.060(5).

It lists the landlord's obligations. RCW 59.18.060. And it lists the tenant's remedies: (1) terminate the rental agreement; (2) "[b]ring an action in an appropriate court, or at arbitration if so agreed, for any remedy provided under this chapter *or otherwise provided by law;* " or (3) pursue the other remedies available under the Landlord–Tenant Act. RCW 59.18.090 (emphasis added).

Dexheimer. In *Dexheimer*, we rejected a tenant's claim for tort damages following breach of the Landlord–Tenant Act. We concluded that the tenant's remedies for the landlord's breach of RCW 59.18.060 were limited to only those remedies specifically set forth in our Landlord–Tenant Act. *Dexheimer v. CDS, Inc.*, 104 Wash.App. 464, 471, 17 P.3d 641 (2001). Other jurisdictions allow a tenant's cause of action arising from statutory duties under [258]its versions of the Uniform Landlord–Tenant Act.[12] And Washington commentators appear to agree.[13] We conclude that the Washington Residential Landlord–Tenant Act of 1973 provides a cause of action for the injury sustained here.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions. RCW 2.06.040.

WE CONCUR: KATO, A.C.J., and KURTZ, J.

11. *Contra Dexheimer*, 104 Wash.App. at 471, 17 P.3d 641 (observing that the Landlord–Tenant Act "represents a series of compromises between the interest of the modern-day landlord and the tenant").

12. *See, e.g., Newton v. Magill*, 872 P.2d 1213, 1216–18 (Alaska 1994); *Thomas v. Goudreault*, 163 Ariz. 159, 166–67, 786 P.2d 1010 (Ct.App. 1989); *Stoiber v. Honeychuck*, 101 Cal.App.3d 903, 162 Cal.Rptr. 194 (1980); *Thompson v. Crownover*, 259 Ga. 126, 128–29, 381 S.E.2d 283 (1989); *Bybee v. O'Hagen*, 243 Ill.App.3d 49, 51–52, 183 Ill.Dec. 842, 612 N.E.2d 99 (1993); *Hodge v. Nor–Cen, Inc.*, 527 N.E.2d 1157, 1160 (Ind.Ct.App.1988) (no residential landlord-tenant act but liability under common law if tenant is injured due to defective condition the landlord agreed to repair or negligently repaired; violation of building codes is negligence per se); *Houston v. York*, 755 So.2d 495 (Miss.Ct.App. 1999); *Kunst v. Pass*, 1998 MT 71, 288 Mont. 264, 957 P.2d 1; *Shroades v. Rental Homes, Inc.*, 68 Ohio St.2d 20, 25, 427 N.E.2d 774 (1981) ("remedies provided in [Ohio's residential landlord-tenant act] are cumulative.... For example, the remedy of depositing rental payments with the clerk of court is grossly inadequate to compensate tenants for the types of injuries sustained in the present case"); *Coulter Prop. Mgmt., Inc v. James*, 328 Or. 164, 970 P.2d 209 (1998); *Nedrow v. Pruitt*, 336 S.C. 668, 521 S.E.2d 755 (Ct.App.1999); *Crawford v. Buckner*, 839 S.W.2d 754 (Tenn.1992). *Cf. Schuman v. Kobets*, 760 N.E.2d 682 (Ind.Ct.App.2002) (addressing common law in states where the Uniform Landlord–Tenant Act was *not* adopted, and finding that no cause of action can be brought under an implied warranty of habitability).

13. 2 WASH STATE BAR ASS'N, WASHINGTON REAL PROPERTY DESKBOOK § 27.6(3) (3d ed.1996); William H. Clarke, *Washington's Implied Warranty of Habitability: Reform or Illusion?*, 14 GONZ L.REV 1, 22, 39, (1978); William B. Stoebuck, *The Law Between Landlord and Tenant in Washington: Part I*, 49 WASH L.REV. 291, 364–65 (1974).

does not require Qwest to pay intercarrier compensation on calls placed to ISPs located outside the caller's local calling area—such as VNXX calls (unless the WUTC decides to define this traffic as within a local calling area)—Qwest is not, under the WUTC's present analysis, contractually obligated to pay Pac–West or Level 3 the interim compensation rates established by the FCC.

However, the holding of this Court is limited. By reversing and remanding this case, the Court does not hold that the WUTC lacks the authority to interpret the parties' interconnection agreements to require interim rate cap compensation to Pac–West and Level 3 for the ISP-bound VNXX calls at issue. On remand, the WUTC is simply directed to reinterpret the *ISP Remand Order* as applied to the parties' interconnection agreements, and classify the instant VNXX calls, for compensation purposes, as within *or* outside a local calling area, to be determined by the assigned telephone numbers, the physical routing points of the calls, or any other chosen method within the WUTC's discretion. It is plausible that the ultimate conclusion reached by the WUTC will not change. *See, e.g., Peevey,* 462 F.3d at 1157–59; *Pacific Bell,* 325 F.3d at 1130. However, the method by which that conclusion will be reached must not contravene federal telecommunications law and policy. *Accord AT & T Corp. v. Iowa Utilities Bd.,* 525 U.S. 366, 378 n. 6, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999) ("[T]here is no doubt ... that if the federal courts believe a state commission is not regulating in accordance with federal policy[,] they may bring it to heel.").

and called NPA–NXX number, not by the physical routing of the call. For a similar approach, see *Peevey,* 462 F.3d at 1157–59.

VII. CONCLUSION

For the foregoing reasons, the final decisions of the WUTC are REVERSED and REMANDED for further proceedings not inconsistent with this Order.

Shelley PINCKNEY, Plaintiff,

v.

Marjorie Starnes SMITH, Defendant.

No. CV06–1339 MJP.

United States District Court,
W.D. Washington,
at Seattle.

May 1, 2007.

Background: Tenant filed suit against landlord for injuries sustained from falling on stairway to basement of dwelling, alleging landlord that failed in her duties and breached warranty of habitability by not installing a handrail on stairway. After removal, landlord moved for summary judgment.

Holdings: The District Court, Pechman, J., held that:

(1) constructive notice of a defective condition on leased premises is sufficient to prove landlord's awareness, and

(2) fact issue as to level of danger to tenant's health or safety precluded summary judgment.

Motion denied.

1. Landlord and Tenant ⇐164(1)

To establish landlord's liability under Washington law for injuries to tenant caused by defective condition on leased premises, the tenant must show that: (1) the condition was dangerous; (2) the landlord was aware of the condition or had a reasonable opportunity to discover the condition and failed to exercise ordinary care to repair the condition; and (3) the existence of the condition was a violation of an implied warranty of habitability or a duty created by statute or regulation. Restatement (Second) of Property (Landlord & Tenant) § 17.6 (1977).

2. Landlord and Tenant ⇐164(6)

Constructive notice of a defective condition on leased premises is sufficient to satisfy requirement of landlord's awareness of defective condition to establish landlord's liability under Washington law for injuries to tenant from such condition. Restatement (Second) of Property (Landlord & Tenant) § 17.6 (1977).

3. Landlord and Tenant ⇐164(6)

Landlords may not shield themselves from liability under Washington law for injuries to tenants caused by defective condition on leased premises by consciously ignoring the condition of the property before renting to tenants.

4. Landlord and Tenant ⇐164(1)

With the abolition of the negligence per se doctrine in Washington, evidence of a landlord's statutory violation is insufficient to satisfy the requirement that a dangerous condition on leased property violated an implied warranty of habitability or a duty created by statute or regulation, in order to establish landlord's liability for injuries to tenants caused by such condition. West's RCWA 5.40.050; Restatement (Second) of Property (Landlord & Tenant) § 17.6 (1977).

5. Federal Courts ⇐383

In the absence of controlling authority from Washington's highest court, the federal district court must follow the decisions of Washington's intermediate appellate courts unless there is convincing evidence that the highest court would decide the issue differently.

6. Courts ⇐92

"Dictum" is any statement in a court opinion that is not necessary to the disposition of the case.

See publication Words and Phrases for other judicial constructions and definitions.

7. Federal Civil Procedure ⇐2515

Fact issue as to whether landlord's failure to install handrail on stairway of leased dwelling in violation of building code posed substantial danger to tenant's health or safety, in violation of warranty of habitability, precluded summary judgment in tenant's suit for injuries sustained from fall on stairway. West's RCWA 59.18.060(1).

Bruce Trumbull Clark, R. Drew Falkenstein, Marler Clark, L.L.P., P.S., Seattle, WA, for Plaintiff.

James Thomas Derrig, Eklund Rockey Stratton, Seattle, WA, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

PECHMAN, District Judge.

This matter comes before the Court on motion for summary judgment by Defendant Marjorie Starnes Smith. Having reviewed the record and the documents submitted by the parties (Dkt.Nos. 1, 5, 13–23), the Court DENIES Defendant's motion.

Background

Plaintiff Shelley Pinckney began renting a residential home from Defendant in the Greenlake/Latona neighborhood of Seattle sometime in the summer of 2002. (Derrig Decl., Ex. C, at 5.) The parties did not enter into any formal rental agreement. (*Id.* at 7.) The home was originally purchased by Defendant in 1973, and Defendant personally resided there until 1984, when she moved to Georgia and became a resident of that state. (Smith Decl. ¶ 2; Compl. ¶ 1.2; Answer ¶ 1.2.) Defendant has rented the home to various residential tenants since that time. (Smith Decl. ¶ 3.) The small 670 square-foot home was built in 1920, and consists of a finished upstairs living area and an unfinished basement. (Derrig Decl., Ex. A.) The occupant must use an exterior stairway to access the basement because there is no interior access. (*Id.*) The stairway was constructed at the same time as the residence, consists of six steps ("risers"), and does not have handrails. (Smith Decl. ¶ 3; Compl. ¶ 2.4; Answer ¶ 2.4.)

On April 15, 2005, Plaintiff decided to go to the basement to do some laundry. (Compl.¶ 2.2.) As she stepped outside of the doorway, she caught the heel of her shoe on the cuff of her pants. (*Id.* at ¶ 2.3.) Caught off balance, Plaintiff's foot was pulled away from the top riser and she fell to her right. (*Id.*) Plaintiff did not contact anything until she struck the ground, (Derrig Decl., Ex. C, at 16), at which time she suffered a fracture of her femur. (Compl.¶ 2.6.) Her injury required surgery and a lengthy hospital stay and rehabilitation. (*Id.* at ¶¶ 2.7, 2.8.) There is no evidence that the stairway's condition caused any other injuries prior to this incident, and neither Plaintiff nor any previous tenant ever requested that Defendant install handrails on the stairway. (Smith ¶ 3.)

On September 11, 2006, Plaintiff filed suit against Defendant in Washington State superior court seeking damages for her injuries. (Compl.) Plaintiff alleges that Defendant failed in her duties as a landlord and breached the warranty of habitability when she failed to install a handrail on the stairway. (*Id.* at ¶¶ 3.2–3.3.) Defendant properly removed the case to federal court on September 15, 2006. (Dkt. No. 1.)

Analysis

I. *Summary Judgment Standard*

Summary judgment is not warranted if a material issue of fact exists for trial. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.1995), *cert. denied*, 516 U.S. 1171, 116 S.Ct. 1261, 134 L.Ed.2d 209 (1996). The underlying facts are viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "Summary judgment will not lie if . . . the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The party moving for summary judgment has the initial burden to show the absence of a genuine issue concerning any material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Once the moving party has met its initial burden, the burden shifts to the nonmoving party to establish the existence of an issue of fact regarding an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). To discharge this burden, the nonmoving party cannot rely on its pleadings, but instead must have evidence showing that there is a

genuine issue for trial. *Id.* at 324, 106 S.Ct. 2548.

II. *Landlord Liability for Defective Conditions on the Leased Premises*

[1] In general, a landlord is not liable to a tenant for injuries that are caused by a defective condition on the leased premises. *Brown v. Hauge,* 105 Wash.App. 800, 804, 21 P.3d 716 (2001); Restatement (Second) of Torts § 356 (1965). However, the Restatement (Second) of Property provides the following exception to the general rule of nonliability:

> A landlord is subject to liability for physical harm caused to the tenant ... by a dangerous condition existing before or arising after the tenant has taken possession, if he has failed to exercise reasonable care to repair the condition and the existence of the condition is in violation of:
>
> (1) an implied warranty of habitability; or
>
> (2)a duty created by statute or administrative regulation.

Restatement (Second) of Property (Landlord & Tenant) § 17.6 (1977). To establish liability under § 17.6, the tenant must show that: (1) the condition was dangerous; (2) the landlord was aware of the condition or had a reasonable opportunity to discover the condition and failed to exercise ordinary care to repair the condition; and (3) the existence of the condition was a violation of an implied warranty of habitability or a duty created by statute or regulation. *Lian v. Stalick,* 115 Wash. App. 590, 595, 62 P.3d 933 (2003) ("*Lian II*"). For the purposes of this motion, Defendant concedes that there is an issue of fact on the first element: whether the condition was dangerous. However, Defendant argues that Plaintiff cannot raise an issue of fact on the remaining two elements.

A. *Awareness of the Condition*

Although Defendant admits that she was aware that the stairway had no handrail, (Smith Decl. ¶ 3) she argues that such knowledge is insufficient. Instead, Defendant argues that she must be placed on notice that the condition is in need of repair. In support of her interpretation of this notice requirement, Defendant cites a case in which the Washington court of appeals held a landlord liable because he was aware that steps were rotted and in need of repair. *Lian v. Stalick,* 106 Wash. App. 811, 814, 25 P.3d 467 (2001) ("*Lian I*"). Defendant argues that the poor condition of the stairs in that case was obvious, whereas in the present case, the technical violation of the local housing code did not provide sufficient notice for Defendant to know that the condition was in need of repair. Defendant also argues that the lack of notice is evidenced by the fact that she has owned the property for over thirty years and has never heard of anyone suffering an injury as a result of the stairway's condition and she has never received a request to add handrails.

However, Defendant cites no cases or authority supporting the proposition that actual notice of the dangerous condition is required, and her argument is both illogical and contrary to public policy. First, the Seattle Municipal Code explicitly distinguishes between owners and lessors, placing onerous compliance standards on the latter. *See e.g.,* SMC § 22.206.160(A)(7) (2003) (exempting owner-occupied dwellings from compliance with minimum safety standards). It would be illogical to suggest that the City intended to impose standards on lessors without requiring them to take notice of the standards. For the same reason, it would be illogical to suggest that the legislature would enact the Residential Landlord Tenant Act ("RLTA"), which requires land-

lords to comply with applicable ordinances relating to health and safety, if the lessor was under no obligation to take notice of building codes.

[2] The parties do not dispute that Defendant had constructive notice of the building code violations. The Seattle Municipal Code requires that all lessors must maintain the rental structure in compliance with Seattle's minimum building standards. SMC § 22.206.160(A)(7). One of the building standards that lessors must comply with requires that all stairways having three or more risers must have a handrail. SMC § 22.206.130(A)(3) (2004). These local building code requirements were in effect at the time Defendant decided to rent the premises to Plaintiff, and Defendant should have examined them before leasing the property.

[3] Second, Defendant's argument runs counter to sound public policy. It would be inappropriate to permit Defendant to insulate herself by relying on her own willful blindness about the defective condition of the rental property. Defendant admits that in the twenty years she has been leasing the property, she has not seen the interior of the home nor had the property inspected for defective conditions. (Clark Decl., Ex. 1, at 41, 43.) Lessors may not shield themselves from liability by consciously ignoring the condition of the property before renting to tenants. Accordingly, constructive notice of a defective condition provides sufficient notice to a landlord to satisfy the second element of the restatement test.

B. *Existence of a Dangerous Condition Violating a Duty*

The final element of the restatement test requires evidence that the existing dangerous condition is in violation of either (1) a statute or regulation; or (2) the implied warranty of habitability.

1. *Dangerous Condition in Violation of a Statute or Regulation*

[4] Plaintiff cannot survive summary judgment solely by demonstrating a violation of a statute. The statutory violation portion of the restatement rule is predicated on the assumption that a statutory violation constitutes negligence per se. *See* Rest.2d Property § 17.6 cmt. a ("[T]he rule of this section is based on the assumption that the statute or regulation represents a legislative determination of the standard of conduct required of the landlord, so that a violation constitutes negligence per se...."). In Washington, "[a] breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence...." RCW 5.40.050 (2004). Therefore, with the abolition of the negligence per se doctrine in Washington, evidence of a statutory violation is insufficient to satisfy the final element of the restatement rule.

The court of appeal's adoption of the restatement rule in *Lian II* is not to the contrary. *Lian II* was limited to the question of a violation of the warranty of habitability. Indeed, although that case involved a staircase that violated the building code in five ways, the court confined its analysis to the warranty of habitability. Had the *Lian II* court held that a statutory violation was sufficient evidence to establish the third element of the restatement test, it would not have addressed the warranty of habitability. Accordingly, Plaintiff must present evidence that the condition violated the warranty of habitability to avoid summary judgment.

2. *Violation of the Warranty of Habitability*

In Washington, the warranty of habitability has been legislatively codified in the

RLTA. *See* RCW 59.18.060 (2004). The relevant portion of the statute provides as follows:

> The landlord will at all times during the tenancy keep the premises fit for human habitation, and shall in particular:
>
> (1) Maintain the premises to substantially comply with any applicable code, statute, ordinance or regulation governing their maintenance or operation ... if such condition substantially endangers or impairs the health or safety of the tenant[.]

Id. Similarly, the Seattle Municipal code provides that "[i]t shall be the duty of all owners to ... [m]aintain the building and equipment in compliance with the minimum standards specified [in the building code]." SMC § 22.206.160(A)(7). The building code requires handrails on stairways with more than six risers. SMC § 22.206.130(A)(3).

Defendant argues that this case does not implicate the warranty of habitability because the RLTA only requires a landlord to "maintain" the rental building. Defendant cites the dictionary definition of "maintain" as "to keep in a state of repair, efficiency, or validity: preserve from failure or decline." (App.2.) Under this definition, Defendant suggests that the word "maintain" places a duty on the landlord to maintain the property in compliance with existing building codes and eliminates any duty on her part to upgrade the property as building codes change. But in context, the use of the word "maintain" in the RLTA should be read more broadly than Defendant suggests. The word "maintain" in the RLTA is modified by the requirement of compliance with applicable building codes. Thus, a building that is not in compliance with applicable ordinances is not "maintained" for purposes of the law. Accordingly, a landlord is in breach of Washington's statutory warranty of habitability if she fails to maintain the premises in compliance with applicable building ordinances. Defendant does not dispute that the missing handrail violated local building codes, *see* SMC § 22.206.130(A)(3), and Plaintiff has offered photos of the stairway depicting it without handrails. (Derrig Decl., Ex. E.)

[5] To implicate the warranty of habitability, a defective condition that violates building code requirements must also be dangerous. *See* RCW 59.18.060. Washington appellate courts have reached opposing conclusions as to what conditions are sufficiently dangerous to qualify a residence as uninhabitable and the Washington Supreme Court has not decided the issue. Division one courts hold that a condition does not violate the warranty of habitability unless the condition is so severe that the dwelling is actually unfit to live in. *See Wright v. Miller*, 93 Wash. App. 189, 200–01, 963 P.2d 934 (1998). Conversely, division three courts hold that the warranty applies whenever the defects of a structure pose an actual or potential safety hazard to its occupants. *Lian I*, 106 Wash.App. at 818, 25 P.3d 467. In the absence of controlling authority from Washington's highest court, the court must follow the decisions of Washington's intermediate appellate courts unless there is convincing evidence that the highest court would decide the issue differently. *See In re Kirkland*, 915 F.2d 1236, 1238 (9th Cir. 1990). Because there is a split of authority between the different court of appeals divisions, the Court will determine how the Washington State Supreme Court would decide the issue.

Defendant argues that a dangerous condition does not implicate the warranty of habitability unless the condition is so dangerous that the dwelling is actually unfit to live in. Otherwise, Defendant argues, the first element of the restatement test (existence of a dangerous condition) would be

identical to the third element (violation of the warranty of habitability). In support of his argument, Defendant cites two cases from the court of appeals holding that a condition does not make a structure uninhabitable unless the dwelling is actually unfit to live in. *See Wright*, 93 Wash.App. 189, 963 P.2d 934; *Howard v. Horn*, 61 Wash.App. 520, 810 P.2d 1387 (1991). In *Howard*, the tenant injured himself in a fall and alleged that the injury could have been avoided if the landlord had complied with local building codes requiring handrails and safety glass. 61 Wash.App. at 523, 810 P.2d 1387. Relying on the Washington Supreme Court's decision in *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wash.2d 406, 745 P.2d 1284 (1987) (holding that defects in walkways leading to condominiums could render them unfit for their intended purpose), the division three court held that the landlord had not violated the warranty of habitability because the defects complained of did not render the house unfit to live in. *Id.* at 525, 745 P.2d 1284. Similarly, in *Wright*, the tenant was injured when he fell down a staircase. 93 Wash.App. at 200, 963 P.2d 934. The stairway lacked a complete handrail, which was a violation of the Seattle building code. *Id.* Relying on *Stuart* and *Howard*, the court concluded that the only conditions that violate the warranty of habitability are those which render a dwelling unfit to live in. *Id.* at 200–01, 963 P.2d 934.

However, in Lian I, division three considered *Stuart*, *Howard*, and *Wright*, and rejected a bright-line rule. 106 Wash.App. at 817, 25 P.3d 467. The court distinguished those cases based on the Washington Supreme Court's decision in *Atherton Condominium Apartment–Owners Association Board v. Blume Development Co.*, 115 Wash.2d 506, 799 P.2d 250 (1990). In that case, the Court declined to apply *Stuart* as a general rule, and stated that violations of the warranty of habitability should be determined on a case-by-case basis. *Id.* at 520, 799 P.2d 250. The Court stated that building codes pertaining to fire safety were neither trivial nor aesthetic concerns and concluded that the defendant's violation of those codes was sufficiently dangerous to implicate the warranty of habitability.[1] *Id.* at 522, 799 P.2d 250. The *Lian I* court relied on the Court's holding in *Atherton* when it concluded that the landlord's failure to comply with building codes requiring a handrail and failure to maintain the steps in a useable condition constituted a violation of the warranty of habitability. 106 Wash.App. at 817–18, 25 P.3d 467. Summing up the rule, the court stated that a condition violates the warranty if it poses an actual or potential safety hazard to its occupants. *Id.* at 818, 25 P.3d 467.

[6] Defendant dismisses the rule stated in Lian I as dictum. Dictum is any statement in a court opinion that is not necessary to the disposition of the case. *NLRB v. Int'l Bhd. of Elec. Workers, Local 340*, 481 U.S. 573, 592 n. 15, 107 S.Ct. 2002, 95 L.Ed.2d 557 (1987). Defendant incorrectly categorizes the *Lian I* statement as dictum; the stated rule is not dictum because it was necessary to the disposition of the case. If the court had not relied on the rule as stated, it would have been forced to determine whether the dwelling was actually uninhabitable. The court did not find that the dwelling was

1. Although Washington law treats fire safety protections with special care, *see* RCW 5.40.050 (exempting fire safety measures from law abolishing negligence per se doctrine), *Atherton* is still applicable in these circumstances. A jury could conclude that the breached handrail ordinance was neither aesthetic nor trivial and created serious risk of potential injury.

actually uninhabitable, and dismissed the defendant's argument that it needed to do so as unpersuasive. *Lian I,* 106 Wash. App. at 818, 25 P.3d 467.

[7] Plaintiff does not need to prove that the building was actually unfit to live in to prove a violation of the warranty of habitability. First, both *Howard* and *Wright* relied solely on the older Washington Supreme Court case—*Stuart*—and did not consider *Atherton,* which states that questions relating to the warranty of habitability must be made on a case-by-case basis. *Atherton* is also notable because it involved a discussion of the warranty of habitability in the context of a sale between two owners of property. 115 Wash.2d 506, 799 P.2d 250. There is an even stronger case for extending the more flexible *Atherton* analysis to landlord-tenant disputes in light of the legislature's decision to provide extra protection to tenants when it enacted the RLTA. Second, because *Lian I* repudiated the *Howard* decision, it also undermined the foundation of the *Wright* decision which relied on *Howard.* Finally, the Washington Supreme Court has stated that although housing code violations do not establish a prima facie case that premises are uninhabitable, they are evidence which aid in establishing that premises are uninhabitable. *Foisy v. Wyman,* 83 Wash.2d 22, 31, 515 P.2d 160 (1973).

As Defendant has stated, determining whether a condition is sufficiently dangerous to violate the warranty of habitability is ultimately one of degree. Defendant is correct that a condition must be more than simply dangerous to violate the warranty, otherwise the first and third elements of the restatement test merge. However, the statutory warranty of habitability in the RLTA contemplates the question of degree, stating that a condition violating an applicable building code is a violation of the warranty if "such condition *substantially* endangers or impairs the health or safety of the tenant[.]" RCW 59.18.060(1) (emphasis added). Thus, Plaintiff must raise an issue of fact as to whether the building code violation substantially endangered or impaired her health or safety to establish a violation of the warranty of habitability. Because Defendant has conceded the question of dangerousness for the first element, it stands to reason that the level of dangerousness is also an unresolved issue of fact. Accordingly, because Plaintiff has submitted photos of the stairway without handrails, and Defendant has admitted that the stairway failed to comply with local building codes, Plaintiff has raised an issue of fact on the level of dangerousness posed to Plaintiff's health or safety sufficient to preclude summary judgment.

Conclusion

Plaintiff may only establish liability on behalf of the Defendant if she can demonstrate that Defendant had notice of the defective condition of the property, and that the condition was a violation of the warranty of habitability. Plaintiff has presented sufficient evidence to generate an issue of fact on each of these points. First, Defendant was aware that the stairway lacked a handrail, and the ordinance requiring a handrail was in force at the time she rented the unit to Plaintiff. Second, Plaintiff produced evidence that the stairway did not comply with building codes, and an issue of fact remains as to the level of dangerousness posed by the non-compliance.

Although there is a split in the different divisions of the court of appeals as to what qualifies as "uninhabitable" under the RLTA, this Court concludes that the Washington Supreme Court would hold that Plaintiff does not need to prove that the building was actually unfit to live in to prove a violation of the warranty of habita-

bility. The trend in Washington State Supreme Court cases suggests that unless building code violations are either trivial or aesthetic, violations of those codes implicate the warranty of habitability. Accordingly, Defendant's motion for summary judgment is denied.

The Clerk is directed to send copies of this order to all counsel of record.

Mark JORDAN, Plaintiff,

v.

Michael V. PUGH, J. York, R.E. Derr, B. Sellers, and Stanley Rowlett, Defendants.

Civil Action No. 02-CV-01239-MSK-PAC.

United States District Court, D. Colorado.

May 2, 2007.

Background: Federal prisoner brought action against prison officials challenging the constitutionality of Bureau of Prisons (BOP) regulation prohibiting prisoners from acting as reporter or publishing under a byline. Prisoner petitioned for permission to attend trial in person and moved for reconsideration of court order granting defendants' motion to preclude testimony of two witnesses who were also prisoners.

Holdings: The District Court, Krieger, J., held that:

(1) circumstances did not warrant granting petition, and

(2) proffered testimony of other prisoners was not relevant.

Ordered accordingly.

1. Witnesses ⇨18

Although court had previously granted prisoner's petition for writ of habeas corpus ad testificandum, authorizing him to appear in person on the initially scheduled date for trial on his claim that Bureau of Prisons (BOP) regulation prohibiting prisoners from acting as reporter or publishing under a byline was unconstitutional, court would not grant prisoner's subsequent petition for permission to attend trial on its reset date; circumstances had changed since the court granted prisoner's previous petition, namely prisoner had been ably represented by counsel for more than one year, trial was to the bench, allowing for flexibility not only in the order and presentation of evidence, but in the scheduling of recesses to accommodate prison schedules, there were significant security concerns associated with prisoner's presence in the courtroom during trial, and prisoner's rights could be adequately protected through his appearance at trial by video. 28 C.F.R. § 540.20(b).

2. Civil Rights ⇨1412

Proffered testimony of prospective witnesses, in action challenging Bureau of Prisons (BOP) regulation prohibiting prisoners from acting as reporter or publishing under a byline, was not relevant to sole issue in case, namely whether regulation violated First Amendment; prospective witnesses, who were also prisoners, were expected to testify that BOP knew about their publications, yet chose not to punish them. U.S.C.A. Const.Amend. 1; 28 C.F.R. § 540.20(b).

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